Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1515

UNITED STATES OF AMERICA, PETITIONER

v.

ELWOOD SWANK AND RITA SWANK

UNITED STATES OF AMERICA, PETITIONER

v.

BLACK HAWK CORPORATION, INC.

UNITED STATES OF AMERICA, PETITIONER

v.

BULL RUN MINING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 27, 1980
CERTIORARI GRANTED MAY 12, 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1515

UNITED STATES OF AMERICA, PETITIONER

v.

ELWOOD SWANK AND RITA SWANK

UNITED STATES OF AMERICA, PETITIONER

v.

BLACK HAWK COAL CORPORATION, INC.

UNITED STATES OF AMERICA, PETITIONER

v.

BULL RUN MINING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

	Page
Elwood Swank and Rita Swank	
Relevant Docket Entries	1a
Petition	8a
Answer	13a
Amended Petition	15a

Page

Amended Answer 16a
Partial Stipulation of Facts 17a
Exhibit A (Lease of October 24, 1964)..... 22a
Exhibit B (Lease of October 26, 1966)..... 31a
Exhibit C (Lease of July 25, 1966) 41a
Exhibit D (Equipment purchases)..... 48a
Supplemental Stipulation 50a
Trial Judge's Findings of fact (filed November 6, 1978)..... 51a

Black Hawk Coal Corporation

Relevant Docket Entries 58a
Petition 60a
Answer 65a
Stipulation of Facts 68a
Exhibit 4 (Lease of February 20, 1964)..... 73a

Bull Run Mining Co., Inc.

Relevant Docket Entries 87a
Exhibit A (Lease of June 21, 1967)..... 90a
Answer 94a
Exhibit D (Lease of April 1, 1960) 101a
Order Granting Certiorari..... 117a

RELEVANT DOCKET ENTRIES

GENERAL

No. 403-75

ELWOOD SWANK AND RITA SWANK

v.

THE UNITED STATES

Income tax
November 18 1975

5 COPIES OF PETITION TO DEFENDANT.
$34,926.59
R.D. #1, Box 85 D
Paxinos, PA

Nov 18 1975	Filing fee of $10 paid by plaintiffs.
Dec 10 1975	Notice of reference to Trial Judge C. Murray Bernhardt filed. Copy to parties.
Jan 19 1976	Defendant's answer to the petition filed. Copies (5) to atty.
Nov 26 1976	Defendant's motion for an order directing a response to request for admissions filed. Copies (2) to atty.
Dec 27 1976	Plaintiffs' motion for order directing a response to plaintiffs' request for admissions filed. Copies (2) to deft. DENIED JAN 24 1978 without prejudice.
Dec 27 1976	Plaintiffs' objections to defendant's motion for an order directing a response to request for admissions and request for admissions filed. Copies (2) to deft.
Jan 6 1977	Defendant's reply to plaintiffs' objections to defendant's request for admissions filed. Copies (2) to atty.

Jan 26 1977	Defendant's motion for extension of time (to February 25, 1977) to file objections to request for admissions filed. Copies (2) to atty. ALLOWED FEB 2 1977.
Feb 25 1977	Defendant's motion for extension of time (to March 12, 1977) to respond to request for admissions filed. Copies (2) to atty. ALLOWED MAR 15 1977.
Mar 14 1977	Defendant's supplemental motion for an order directing plaintiffs to respond to defendant's request for admissions, etc. filed. Copies (2) to atty. DENIED NOV 15 1977.
Mar 14 1977	Defendant's objections to plaintiffs' request for admissions filed. Copies (2) to atty.
Mar 28 1977	Plaintiffs' reply to objections to request for admissions filed. Copies (2) to deft.
Apr 11 1977	Plaintiffs' motion to strike defendant's supplemental motion for an order directing plaintiffs to respond to defendant's request for admissions, etc. filed. Copies (2) to deft. SEE ACTION ON MOTION OF MARCH 14, 1977.
Apr 14 1977	Defendant's responses to request for admissions filed. Copies (2) to atty.
Apr 14 1977	Defendant's motion for summary judgment together with appendix in support thereof filed. Copies (5 of motion and 1 of appendix) to atty.
Apr 14 1977	Defendant's motion for leave to file a reduced number of copies (of appendix B) filed. Copies (2) to atty. ALLOWED MAY 6 1977, see endorsement on motion*
May 17 1977	Plaintiffs' brief in opposition to defendant's motion for summary judgment filed. Copies (7) to deft.
May 31 1977	Defendants motion for extension of time (to July 15, 1977) to file its reply brief filed. Copies (2) to atty. ALLOWED JUN 17 1977.

Jul 15 1977	Defendant's motion for extension of time (to August 29, 1977) to file its reply brief filed. Copies (2) to atty. ALLOWED AUG 2 1977 with no further extension of time to be granted except for extraordinary circumstances.
Jul 20 1977	Plaintiffs objections to motion for enlargement of time filed. Copies (2) to deft.
Aug 29 1977	Defendant's motion for extension of time (to September 2, 1977) to file its reply brief filed. Copies (2) to atty. ALLOWED SEP 2 1977.
Sep 2 1977	Defendant's reply brief in support of its motion for summary judgment filed. Copies (5) to atty.
Sep 6 1977	Submitted to the court on defendant's motion for summary judgment.
Nov 11 1977	Court entered order denying defendant's motion for summary judgment and returning the case to the Trial Division as set forth in the order. Copy to parties.
Dec 7 1977	Defendant's motion for leave to take depositions and to serve subpeonas duces tecum filed. Copies (2) to atty. DENIED JAN 5 1978 SEE TRIAL JUDGE'S ORDER THIS DATE.
Dec 21 1977	Plaintiffs' objections and response to motion for leave to take depositions, etc. filed. Copies (2) to deft.
Jan 3 1978	Defendant's reply to plaintiffs' objections to defendant's motion for leave to take depositions and to serve subpoena duces tecum filed. Copies (2) to atty.
Jan 3 1978	Defendant's motion for leave to take depositions and to serve subpoenas duces tecum filed. Copies (2) to atty. SEE TRIAL JUDGE'S ORDER JAN 24 1978 denying, without prejudice.

Jan 5 1978	Trial judge's order on defendant's motion Re: depositions, etc., filed. Copy to parties.
Jan 9 1978	Plaintiffs' motion for leave to amend petition filed. Copies (2) to deft. ALLOWED JAN 23 1978.
Jan 13 1978	Plaintiffs' objections and response to defendant's motion for leave to take depositions and to serve subpoenas duces tecum filed. Copies (2) to deft.
Jan 19 1978	Partial stipulation of facts filed by defendant. Copy to atty,
Jan 24 1978	Trial judge's order on defendant's motion re: depositions* filed. Copy to parties. (*DENIED, without prejudice).
Feb 22 1978	Trial judge's memorandum re pretrial conference filed. Copy to parties.
Mar 15 1978	Plaintiffs' amendment to petition filed. Copies (5) to deft.
Apr 14 1978	Defendant's amended answer filed. Copies (5) to atty.
Apr 20 1978	Transcript of testimony (one volume), taken at Harrisburg, Pennsylvania on March 14, 1978, together with plaintiff's exhibits 1 through 3, and defendant's exhibits 1 through 5 filed. Notice to parties.
Apr 24 1978	Trial judge's order closing proof, etc. filed. Copy to parties.
May 22 1978	Plaintiffs' motion for extension of time (to June 13, 1978) to file requested findings of fact and brief filed. Copies (2) to deft. ALLOWED MAY 22 1978.
Jun 7 1978	Supplemental stipulation of facts filed by defendant. Copies (2) to atty.
Jun 12 1978	Plaintiff's motion for extension of time (to June 23, 1978) to file requested findings of fact and brief filed. Copies (2) to deft. ALLOWED JUN 13 1978.

Jun 16 1978	Plaintiffs' requested findings of fact and brief filed. Copies (2) to deft.
Jul 17 1978	Defendant's motion for extension of time (to August 31, 1978) to file its requested findings, etc. filed. Copies (2) to atty. ALLOWED JUL 18 1978.
Aug 31 1978	Defendant's objections to plaintiffs' requested findings of fact filed. Copies (2) to atty.
Aug 31 1978	Defendant's requested findings of fact filed. Copies (2) to atty.
Aug 31 1978	Defendant's brief to the Trial Judge filed. Copies (2) to atty.
Sep 13 1978	Plaintiffs' motion for extension of time (to Oct. 10, 1978) to file objections to defendant's requested findings of fact, etc. filed. Copies (2) to deft. ALLOWED SEP 13 1978.
Sep 14 1978	Plaintiffs' amendment to requested finding of fact No. 31 filed. Copies (2) to deft. (BLOTJ).
Oct 3 1978	Defendant's motion for leave to file objection to plaintiffs' supplemental requested findings of facts filed. Copies (2) to atty. ALLOWED OCT 3 1978 & filed.
Oct 3 1978	Defendant's objection to supplemental information sought to be added to plaintiff's requested finding 31 filed. Copies (2) to atty.
Oct 10 1978	Plaintiffs' objections to defendant's findings of fact and reply brief filed. Copies (2) to deft.
Nov 6 1978	Trial judge's opinion and findings of fact filed. Copies (5) to parties.
Dec 11 1978	Defendant's motion for leave to file out of time notice of intent to except to trial judge's findings of fact and conclusions of law filed. Copies (2) to atty. ALLOWED DEC 11 1978.

Dec 11 1978	Defendant's notice of intent to except to trial judge's findings of fact, opinion, etc. filed. Copies (2) to atty.
Dec 21 1978	Defendant's motion for enlargement of time (to January 20 1979) to file its brief and exceptions to the Trial Judge's findings of fact filed. Copies (2) to atty. ALLOWED JAN 8 1978.
Jan 22 1979	Defendant's exceptions and brief filed. Copies (5) to atty.
Feb 15 1979	Plaintiffs' motion for enlargement of time (to March 8 1979) to file its opposing brief filed. Copies (2) to deft. ALLOWED FEB 16 1979.
Mar 5 1979	Plaintiffs' opposing brief filed. Copies (5) to deft.
Mar 28 1979	Defendant's motion for leave to file out of time a motion for enlargement of time to file reply brief filed. Copies (2) to atty. ALLOWED MAR 30 1979.
Mar 30 1979	Defendant's motion for extension of time (to April 14, 1979) to fill its reply brief filed. Copies (2) to atty. ALLOWED MAR 30 1979.
Apr 13 1979	Defendant's reply brief filed. Copies (5) to atty.
May 15 1979	See 400-77 for defendant's motion for order directing consolidation.
Jun 4 1979	See 400-77 for argument and submission.
Jul 18 1979	The court concludes that plaintiffs in each case [in this, 49-77, and 400-77], are entitled to recover taxes and interest assessed, plus interest as provided by law with the amounts of recovery to determined pursuant to Rule 131(c). Opinion Per Curiam.
Nov 21 1979	Stipulation for entry of judgment filed by defendant. Copies (2) atty.

Nov 26 1979	Trial Judge's memorandum report for judgment filed. Copy to parties.
Nov 30 1979	Court filed order entering judgment for plaintiffs' in the sum of $35,806.07, plus statutory interest. Copy to parties.
Nov 30 1979	Certified transcript of judgment mailed to attorney of record.

IN THE UNITED STATES COURT OF CLAIMS

ELWOOD SWANK AND RITA SWANK

Plaintiffs

v.

Docket No.

UNITED STATES OF AMERICA

Defendant

PETITION

1. This is an action for the recovery of Internal Revenue taxes and interest thereon which were erroneously, illegally and improperly assessed and collected from plaintiffs by defendant. Jurisdiction is based upon the provisions of 28 U.S.C. Sections 1346(a)(1) and 1491.

2. Plaintiffs' names are ELWOOD SWANK and RITA SWANK, husband and wife, residing at R.D. #1, Box 85 D, Paxinos, Pennsylvania. The returns for the periods here involved were filed timely with the District Director of Internal Revenue, Philadelphia, Pennsylvania.

3. Defendant is United States of America which, at all times material to this case, was acting by or through its District Director, Internal Revenue Service, Mid-Atlantic Region, in Philadelphia, Pennsylvania.

4. Plaintiffs timely filed their joint 1966 and 1967 United States Individual Income Tax Returns with the District Director, Internal Revenue Service, Mid-Atlantic Region, in Philadelphia, Pennsylvania, and paid the tax shown to be due thereon in the amount of $9,957.28.

5. In their joint 1966 United States Individual Income Tax Return, Plaintiffs claimed a deduction from ordinary income in the amount of $41,371.24 as a deduction for depletion of coal resources in which Plaintiff Elwood Swank had an economic interest in 1966.

6. In their joint 1967 United States Individual Income Tax Return, Plaintiffs claimed a deduction from ordinary income in the amount of $16,274.00 as a deduction for de-

pletion of coal resources in which plaintiff Elwood Swank had an economic interest in 1967.

7. A deficiency for the year 1966 in the amount of $21,720.11 was assessed by Defendant against Plaintiffs and was paid by Plaintiffs during 1972, together with interest in the amount of $6,055.15 and a penalty in the amount of $763.22 for a total payment of $28,538.48.

8. A deficiency for the year 1967 in the amount of $8,867.74 was assessed by Defendant against Plaintiffs and was paid by Plaintiffs during 1972, together with interest in the amount of $2,899.78, for a total payment of $11,767.52.

9. $19,662.80 of the assessment referred to in paragraph 7 of this Petition and $7,351.79 of the assessment referred to in paragraph 8 of this Petition were based respectively upon Defendant's erroneous disallowance of the $41,371.24 referred to in paragraph 5 of this Petition and the $15,204.32 referred to in paragraph 6 of this Petition as deductions for depletion claimed from gross income reported on Schedule C of their joint 1966 and 1967 United States Individual Tax Returns respectively.

10. Pursuant to a Deep Mining Lease, dated October 24, 1964, by and between the County of Northumberland, Lessor, and Plaintiff Elwood Swank, a sole proprietor, t/d/b/a Split Vein Coal Company, Plaintiff Elwood Swank, as an independent coal mining operator, engaged in the extraction of coal by the process of deep mining, during 1966 and 1967 on 112 acres of land at or near Trevorton, Northumberland County, Pennsylvania. A copy of this lease is attached hereto as Exhibit "A" and made a part hereof.

11. Pursuant to a Deep Mining Lease, dated October 26, 1966, by and between the County of Northumberland, as Lessor, and Plaintiff Elwood Swank, a sole proprietor, t/d/b/a Split Vein Coal Company, Plaintiff Elwood Swank as an independent coal mining operator, engaged in the extraction of coal by the process of deep mining, during 1966 and 1967, on 1,371.5 acres of land in the Township of Coal, Northumberland County, Pennsylvania. A copy of

this lease is attached hereto as Exhibit "B" and made a part hereof.

12. Pursuant to a Stripping Lease, dated July 25, 1966, by and between the County of Northumberland, as Lessor, and Plaintiff Elwood Swank, a sole proprietor, t/d/b/a Split Vein Coal Company Plaintiff Elwood Swank, as an independent coal mining operator, engaged in the extraction of coal by the process of strip mining, during 1966 and 1967, on 133 acres of land in the Township of Coal, Northumberland County, Pennsylvania. A copy of this lease is attached hereto as Exhibit "C" and made a part hereof.

13. Under the laws of the Commonwealth of Pennsylvania, the three leases referred to in paragraphs 10, 11 and 12 of this Petition (hereinafter the "leases") vested in Plaintiff Elwood Swank a fee simple interest in the coal in place by sale and purchase, subject only to the condition that the coal be removed within the period specified in the lease. The transaction left no interest in the Lessor other than the royalties with such attendant rights as were necessary to protect such royalty interest.

14. As an independent miner, Plaintiff Elwood Swank was under no obligation to sell the coal to the Lessor or to any other party. He could sell the coal to whom he pleased and at whatever price he could obtain. The mining operations of Plaintiff Elwood Swank were not supervised or controlled in any manner, except that the Lessor could inspect the premises to determine that the maximum amount of coal was being withdrawn by Plaintiff Elwood Swank without damage to the surrounding interest. Under the leases, Plaintiff Elwood Swank had the right to mine the coal to exhaustion.

15. The coal mined from the operations under the leases was delivered by Plaintiff Elwood Swank to his breaker for cleaning and sizing, and, thereafter, was sold by Plaintiff Elwood Swank on the open market to the general public.

16. The Lessor under the leases derives no income from the mining operations under the leases, except the royalty

of 35 cents per gross ton of raw coal removed from the land.

17. The Lessor under the leases retained no right to terminate the leases except for noncompliance with the convenants in the leases relating to royalties and the conditions of operation or upon failure to continue work on the leased premises for a period of 30 days. The latter provisions are normal provisions in all mineral leases in the anthracite region and are inserted only for the protection of the royalty interest of the Lessor.

18. The interest of Plaintiff Elwood Swank under the leases constitutes an economic interest in the coal in place, as that term is used in U.S. Treasury Regulations Section 1.611-1(b).

19. On or about February 25, 1974, Plaintiffs filed timely Claims for Refund for the years 1966 and 1967 with the District Director, Internal Revenue Service, Mid-Atlantic Region, in Philadelphia, Pennsylvania. Copies of these Claims for Refund are attached hereto as Exhibit "D."

20. Plaintiffs received a notice from Defendant dated January 14, 1975, which stated that Defendant proposed to disallow Plaintiffs' Claims for Refund.

21. During March, 1975, Plaintiffs received notices from Defendant, dated March 13, 1975, which advised Plaintiffs that Defendant formally had disallowed Plaintiffs' Claims for Refund.

22. The actions of Defendant in assessing and collecting the deficiencies referred to in paragraphs 7 and 8 of this Petition and in disallowing Plaintiffs' Claims for Refund were improper, illegal and erroneous.

23. Plaintiffs have overpaid their United States Individual Income Tax for the years 1966 and 1967 in the amount of $27,014.59 with interest in the amount of $7,912.00, which amounts together with interest as provided by law are due and owing to Plaintiffs from the Defendant.

WHEREFORE, Plaintiffs pray that judgment be entered

in their favor in the amount of $34,926.59, together with interest as provided by law, and that the Court grant such other relief as it may deem proper and that Plaintiffs be awarded their costs.

Respectfully submitted,

LLOYD R. PERSUN
HOWELL C. METTE
SHEARER, METTE & WOODSIDE
P.O Box 729
Harrisburg, Pennsylvania 17108
717-232-6701
Attorneys for Plaintiffs

[Exhibits omitted.]

IN THE UNITED STATES COURT OF CLAIMS

No. 403-75

ELWOOD AND RITA SWANK,

Plaintiffs

v.

THE UNITED STATES,

Defendant

ANSWER

JAN 19 1976

Defendant, for its answer to the petition filed in the above-entitled case, denies each and every allegation contained therein, except as specifically admitted herein. Defendant further:

1. Admits jurisdiction pursuant to 28 U.S.C. Section 1491, but denies the remainder of the allegations contained in paragraph 1.

2-4. Admits the allegations contained in paragraphs 2 through 4.

5-6. Denies the allegations contained in paragraphs 5 and 6.

7. Admits that in 1972 plaintiffs were assessed and paid $21,720.11 in additional tax and $6,055.15 in interest for 1966, but denies the remainder of the allegations contained in paragraph 7.

8. Admits that in 1972 plaintiffs were assessed and paid $8,867.74 in additional tax for 1967, but denies the remainder of the allegations contained in paragraph 8.

9. Denies the allegations contained in paragraph 9.

10-12. Admits the allegations contained in paragraphs 10 through 12.

13. Denies the allegations contained in paragraph 13.

14–16. Avers that its attorney is presently unable to obtain knowledge or information sufficient for him to form a belief as to the truth of the allegations contained in paragraphs 14 through 16.

17–18. Denies the allegations contained in paragraphs 17 and 18.

19. Admits the allegations contained in paragraph 19, except denies each and every allegation in the claims for refund not specifically admitted herein.

20–21. Admits the allegations contained in paragraphs 20 and 21.

22–23. Denies the allegations contained in paragraphs 22 and 23.

WHEREFORE, defendant prays that plaintiffs' petition be dismissed with costs assessed against the plaintiffs.

Respectfully submitted.

MYRON C. BAUM *Acting Assistant Attorney General*
CHARLES E. AUSLANDER, JR.
January 16, 1976

IN THE UNITED STATES COURT OF CLAIMS

Docket No. 403-75

ELWOOD SWANK AND RITA SWANK,

Plaintiffs

v.

UNITED STATES OF AMERICA

Defendant

AMENDMENT TO PETITION

AND NOW, this 13th day of March, 1978, in accordance with leave granted by the Learned Trial Judge on January 23, 1978, Plaintiffs hereby amend the Wherefore clause of their Petition as follows:

WHEREFORE, Plaintiffs pray that judgment be entered in their favor in the amount of $34,926.59, together with interest as provided by law and reasonable attorneys' fees and costs of counsel in preparation and presentation of their case, and that the Court grant such other relief as it may deem proper and that Plaintiffs be awarded their costs.

Respectfully submitted,

LLOYD R. PERSUN
HOWELL C. METTE
SHEARER, METTE & WOODSIDE
P.O. Box 729
1801 North Front Street
Harrisburg, Pennsylvania 17108
717-232-6701
Attorneys for Plaintiffs

IN THE UNITED STATES COURT OF CLAIMS

No. 403-75

ELWOOD SWANK AND RITA SWANK,
Plaintiffs

v.

THE UNITED STATES,
Defendant

AMENDED ANSWER

Defendant repeats the responses set forth in its answer to plaintiffs' petition filed November 18, 1975, and states further:

Plaintiffs, having filed an amendment to petition on March 15, 1978, in which they pray for relief including "reasonable attorneys' fees and costs of counsel in preparation and presentation of their case," defendant here states that this Court is without jurisdiction to grant such relief.

WHEREFORE, having responded to the matters raised in plaintiffs' amendment to petition, defendant respectfully requests that plaintiffs' petition, as amended, be dismissed with costs assessed against plaintiffs.

Respectfully submitted,

M. CARR FERGUSON
Assistant Attorney General

JAMES L. MALONE III
Attorney

April 14, 1978

IN THE UNITED STATES COURT OF CLAIMS

No. 403-75

ELWOOD SWANK AND RITA SWANK,
HIS WIFE, PLAINTIFFS

v.

THE UNITED STATES,
DEFENDANT

PARTIAL STIPULATION OF FACTS

AND NOW, this 14th day of December, 1977, it is hereby stipulated and agreed by and between the parties hereto by their respective counsel, for the purposes of this case only, that the following facts may be accepted as true and that the copies of the documents hereto annexed and identified as exhibits are genuine and are true and exact copies of the original thereof, each party, however, reserving the right to object to the relevance and materiality of said facts and documents:

1. Plaintiffs are Elwood and Rita Swank, husband and wife, residing at R.D. #1, Box 85 D, Paxinos, Pennsylvania (hereinafter collectively referred to as "Taxpayers"). Reference hereinafter to "Taxpayer" means husband only, the wife being joined only because of the filing of joint tax returns by Taxpayers during 1966 and 1967.

2. Defendant is the United States of America (hereinafter the "Government").

3. Taxpayer owned and operated a sole proprietorship trading and doing business as Split Vein Coal Company during the entire calendar year 1966 and during the period from January 1, 1967 through April 30, 1967. On May 1, 1967, Taxpayer transferred the assets of his sole proprietorship, Split Vein Coal Company, to Split Vein Coal Company, Inc., in a tax-free incorporation, pursuant to Section 351 of the Internal Revenue Code of 1954, as amended.

4. Taxpayers timely filed their joint 1966 and 1967 United States Individual Income Tax Returns with the District Director, Internal Revenue Service, Mid-Atlantic Region, in Philadelphia, Pennsylvania, and paid the tax shown to be due thereon.

5. In their joint 1966 and 1967 Unaited States Individual Incoem Tax Return, Taxpayers claimed as a deduction from ordinary income a deduction for depletion of coal resources in which Taxpayer claimed an economic interest in 1966 and in 1967.

6. After audit, the Government disallowed the deductions referred to in paragraph 5, above, and, as a result thereof, assessed deficiencies against Taxpayers for the years 1966 and 1967 in the aggregate amount of $30,587.84 which Taxpayers paid under protest to the Government together with assessed interest in the aggregate amount of $3,663.00.

7. At all times material hereto, Split Vein was a sole proprietorship engaged in mining and strip mining anthracite coal as lessee of various mining tracts in the Northumberland County Pennsylvania area. Taxpayer mined only from coal lands which it leased, as Lessee. Taxpayer's mining operations included the deep mining and strip mining methods of mining coal. Taxpayer purchased and owned the machinery and equipment used in its mining operations, and took depreciation deductions on such machinery and equipment.

8. Taxpayer strip mined by using his power shovel to remove the overburdening soil and terrain covering the underlying coal (hereinafter the "overburden"). The power shovel then "stripped" the exposed coal from the earth's surface and placed it in large piles next to loaders. The piled coal then was conveyed by the loaders into trucks which hauled the coal from the leased lands to a breaker where the coal was cleaned and sorted. From the breaker, the coal was sold to the general public on the open market.

9. Taxpayer deep mined by sinking shafts, or inclined slopes, through the overburden into coal veins. When the coal veins were exposed, Taxpayer transported his min-

ers, his employees, in his "buggies", or cars, on rails into the shafts to the coal veins. The miners manually extracted coal from the veins with explosives and pick and shovel and then deposited the extracted coal in the buggies which then transported the extracted coal through the shafts to the earth's surface. At the earth's surface, the coal was trucked to a breaker where, as in the case of strip mined coal, the deep mined coal was cleaned and sorted. From the breaker, the deep mined coal was sold to the general public on the open market.

10. Taxpayer was under no obligation to sell the coal to the Lessor or to any other party. He could sell the coal to whom he pleased at whatever price he could obtain.

11. When the coal was removed from the earth, either by strip mining or deep mining, it was ungraded as to size and contained slate and rock, thereby requiring sorting and cleaning. This cleaning and sorting process was accomplished by using a breaker (which sometimes is called a tipple). A breaker is a plant for processing coal. The breaker removed the slate and rock, and sorted the coal into seven sizes for sale to the general public on the open market. The price per ton of coal varied based on the quality of the coal and the market conditions at the time when the coal was sold to the public.

12. The County of Northumberland is a political subdivision of the Commonwealth of Pennsylvania, and is a county of the fifth class.

13. From time to time, Northumberland County has acquired legal title to substantial acreage of land containing substantial deposits of anthracite by purchase at County Treasurer's sales for delinquent taxes levied by the County and by various Townships and school districts in Northumberland County wherein the land is located. Fee simple title was acquired by the County by virtue of the right of County Commissioners to purchase said land under Section 10 of the Act of May 29, 1931, P.L. 280, as amended, 72 P.S. §5971(j). Said land is held by the County as trustee for the County and the school districts and Townships in which the land is located. During the years

in issue, Northumberland County owned over 17,500 acres of land in Zerbe Township, Coal Township, Mount Carmel Township, East Cameron Township and West Cameron Township, all having been acquired by purchase at County Treasurer's sales for unpaid taxes.

14. The Northumberland County Commissioners, in whom the authority for the operation of county government is vested, entered into leases with individuals, partnerships and corporations for the extraction and removal of coal from the county-owned land in consideration for the payment of royalties to the county. During the taxable years involved, Northumberland County Commissioners collected from Taxpayer the following royalties from coal lands owned by Northumberland County and leased to Taxpayer:

1966 — $7,545.10
1967 — 6,854.05

15. Pursuant to a deep mining lease dated October 24, 1964, by and between the County of Northumberland, as Lessor, and Taxpayer, as miner, Taxpayer engaged in the extraction of coal by the process of deep mining, during 1966 and 1967, on 112 acres of land out or near Trevorton, Northumberland County, Pennsylvania. A copy of this lease is attached hereto as Exhibit "A" and made a part hereof. This lease was terminated in May, 1968 because a mountain slide caused by heavy rains closed the deep mine, thereby preventing further mining of the mine by anyone. In May 1968, rain fell in the Northumberland County, Pennsylvania area on 29 of the 31 days in that month.

16. Pursuant to a deep mining lease dated October 26, 1966, by and between the County of Northumberland, as Lessor, and Taxpayer, as Miner, Taxpayer engaged in the extraction of coal by the process of deep mining, during 1966 and 1967, on 1,371.5 acres of land in the Township of Coal, Northumberland County, Pennsylvania. A copy of this lease is attached hereto as Exhibit "B" and made a part hereof. This lease is still in effect, and Taxpayer's

corporation, Split Vein Coal Company, Inc., is still mining the leasehold pursuant thereto.

17. Pursuant to a stripping lease dated July 25, 1966, by and between the County of Northumberland, as Lessor, and Taxpayer, as Miner, Taxpayer engaged in the extraction of coal by its process of strip mining, during 1966 and 1967 on 133 acres of land in the Township of Coal, Northumberland County, pennsylvania. A copy of this lease is attached hereto as Exhibit "C" and made a part hereof. This lease is still in effect, and Taxpayer's corporation, Split Vein Coal Company, Inc., is still mining the leasehold pursuant thereto.

18. Taxpayer purchased the equipment itemized on Exhibit "D" attached hereto and made a part hereof for use in the mining operations described in this Partial Stipulation of Facts. The said equipment was so used at all times material hereto.

19. The Lessor under the leases described in paragraphs 16, 17 and 18, above (hereinafter the "leases") derived no income from the mining operations under the leases, except the royalty of 35 cents per gross ton of raw coal removed by Taxpayer from the land.

20. The number of employees of Taxpayer during the tax years involved was as follows:

1966 — 14
1967 — 14

21. On or about February 25, 1974, Taxpayers filed timely claims for refund for the years 1966 and 1967 with the District Director, Internal Revenue Service, Mid-Atlantic Region, in Philadelphia, Pennsylvania. The claims for refund were disallowed. Taxpayers timely filed this appeal.

22. The only legal issue before the Court is whether Taxpayer had such an economic interest in the anthracite coal in place under the leases to support a deduction from gross income for depletion under Section 613 of the Internal Revenue Code of 1954, as amended, for the years 1966 and 1967. If the Court so decides, Taxpayers are entitled

to a refund of Federal Income Tax with interest thereon as provided by law, which refund shall later be computed.

Respectfully Submitted,

JAMES L. MALONE, III, ESQUIRE
Department of Justice
Tax Division
Washington, D.C. 20530

LLOYD R. PERSUN
HOWELL C. METTE
SHEARER, METTE & WOODSIDE
P.O. Box 729
1801 North Front Street
Harrisburg, Pennsylvania 17108

M. CARR FERGUSON
Assistant Attorney General

EXHIBIT A

DEEP MINING LEASE

THIS AGREEMENT, made and concluded the 24th day of October, A.D., 1964 by and between the COUNTY OF NORTHUMBERLAND, acting by and through W. Fred Kohler, Fred E. Hoffman and Oscar Kehler its duly elected and qualified County Commissioners, who are hereby acting and contracting for and on behalf of the said County and also as Trustee for the various municipal subdivisions interested in the hereinafter described property, (hereinafter called LESSOR), Party of the First Part, and Split Vein Coal Company—R.D. #1, Paxinos, Penna. Northumberland County, Pennsylvania, (hereinafter called MINER), Party of the Second Part:

WITNESSETH

IN CONSIDERATION of the covenants and agreements hereinafter contained, and in consideration of the sum of ONE ($1.00) DOLLAR, each to the other in hand paid, the receipt whereof is hereby acknowledged, it is

agreed by and between LESSOR AND MINER, the parties of this agreement, as follows:

1. LESSOR, insofar as it has the power and authority so to do, hereby leases and lets unto MINER the coal underlying the following described tract of land, together with the right and privilege of mining and removing the same, but not including any other mineral, gas or substance and not including the right to cut or remove timber, which premises are described as follows, to wit:

> Being Independent Mining Operation No. W-111
> In the No 1 Vein, North dip,
> at or near Southwest of Trevorton, Pa.
> Located on Jeremiah Jackson Tract 112 acres.
> Situate in the Township of West Cameron
> More particularly described as follows:

More particularly described as follows:

> The western limit of this lease is the western line of the Jeremiah Jackson Tract in West Cameron Township. The eastern line is 750 feet east of the above mentioned western line.
>
> A reservation pillar of 100 feet shall be maintained at the eastern limit of this lease with 50 feet to be held by the present lessee and 50 feet to be held by any adjoining lessee.
>
> The mining limit of this lease is for a distance of 700 feet in the Number 1 vein, north dip of the Jeremiah Jackson Tract in West Cameron Township, southwest of Trevorton, Pa.
>
> The lessee shall have a survey made within six months from the date of this lease and periodically or at any time the county Engineers should find it necessary and furnish the County Engineers with a print showing the location of the surface opening and workings on this lease.

2. The LESSOR hereby grants, demises and lets unto the MINER the right and privilege of digging, mining and carrying away anthracite coal wholly at his own expense and cost in and from the described premises, in accordance with the terms and conditions of this agreement.

3. MINER hereby agrees, from and after the exectuion and delivery of this agreement, and until the MINER shall have finally ceased, whether voluntarily or involuntarily, mining upon any or all of said premises, that MINER shall pay as rent and royalty to LESSOR weekly the sum of THIRTY FIVE ($.35) CENTS per gross ton of two thousand two hundred forty (2,240) pounds of raw coal removed from said land. It is understood that the term "raw coal" as used herein shall mean the material taken from the ground, prior to any preliminary cleaning and prior to the time when it shall be prepared in any manner whatsoever.

The MINER agrees to pay the LESSOR the royalty for the said coal or have the same deducted and paid for him by the purchaser of said coal within one week from the time that the coal is mined and removed.

4. The MINER agrees to have all raw coal mined and removed from said tract delivered to any breaker designated by the LESSOR except that the MINER may, with prior consent in writing of the LESSOR, change breakers from time to time, and the LESSOR agrees not to unreasonably withhold its consent to change, provided, however that no coal shall be taken to a breaker outside of Northumberland County. The MINER further agrees that the part breaker operator to whom the coal is delivered shall deduct the herein specified royalty on the gross weight as herein specified upon the delivery of each load of raw coal removed from the said tract described herein.

5. All royalty or rent collected by the breaker operator on raw coal delivered from the tract herein described, shall be paid to the LESSOR together with a complete and adequate record of the royalty collected.

6. MINER agrees to have all raw coal mined and removed from said tract weighted at scales by a duly licensed weighmaster of the Commonwealth of Pennsylvania. The scales to be used shall be selected by the MINER from the list of scales approved by the LESSOR and the MINER shall not take any coal to scales not approved by LESSOR.

7. MINER agrees to have all raw coal mined and removed from said tract weighed at the following approved scales, to wit:

(Name of Approved Scales)

8. MINER further agrees that in the event the MINER desires to weigh raw coal at scales other than the scales specified herein, the LESSOR shall be notified in writing of the desire of the MINER and the MINER shall not change scales until such change is approved by the LESSOR and then shall not change except to approved scales on the list of scales approved by the LESSOR.

9. The MINER agrees to keep complete and accurate records of all raw coal removed from the premises and agrees that the agents of the LESSOR shall have the right and privilege of inspecting said books and records at any time. This record shall include the daily gross tonnage of raw coal mined or removed from the said tract. The MINER also agrees to preserve and keep for two (2) years after termination of this lease, a duplicate weight slip for each and every ton of raw coal mined and removed from the said premises. The MINER also agrees to keep and maintain such records as shall be furnished by the LESSOR under this agreement.

10. MINER hereby agrees that the methods and manner of keeping records, making statements, reports and the time and place of payment of the royalties upon the coal mined and removed from the herein described lands may be changed at any time by the LESSOR.

11. MINER hereby agrees that it will work the land herein mentioned continuously and in a skillful and workmanlike manner under the direction and subject to the approval of the LESSOR, its agents or engineers, to its fullest capacity, and to leave no merchantable coal abandoned or neglected which in the opinion of said agent or engineers can be taken out without injury to the mines or lands.

12. MINER hereby agrees to comply with all the laws of the United States of America and the Commonwealth of Pennsyvlania and to secure any permits and licenses which may be required by the United States of America or Commonwealth of Pennsylvania and particularly from the Pennslyvania Department of Forests and Waters before engaging in any mining under this lease.

13. MINER hereby agrees to protect and save harmless the LESSOR from all liability of whatsoever kind or nature which may be caused by, or which may flow from, the operations of said MINER upon said land.

14. This agreement shall in no way nullify, invalidate or impair in any way the title of the LESSOR and payment of the royalties or rents hereunder shall in no way work or be construed as a redemption either in whole or in part, or as a sale of said land either in whole or in part; nor shall it be construed as an abandonment by the LESSOR of this land, but said tract of land shall remain in the hands of the County Commissioners as LESSOR and the payments made hereunder shall be payments in the nature of rent or royalty. The LESSOR and its said Commissioners, W. Fred Kohler, Fred E. Hoffman and Oscar Kehler, neither individually nor in any capacity assume any liability hereunder except to receive and turn over the Treasurer of Northumberland County such moneys as are received hereunder, so that the County Treasurer may properly distribute them among the various municipal subdivisions interested in the said lands in such proportions as each may be entitled to under the law. It is further understood between the parties hereto that in the event of a sale of said lands by the County or a redemption in full of the said lands by those persons legally entitled to redeem the same, that this lease shall then immediately terminate as well as all rights of the MINER hereunder.

15. It is expressly understood between the parties hereto that the MINER shall operate the lands herein leased as an independent contractor and not as the agent, servant, or employee of LESSOR, and any provision in this agreement pertaining to supervision, inspection or in-

structions by LESSOR, its representatives, engineers, employees or agents, is not intended to, nor shall it be construed in any way, to create a master and servant relationship between the parties hereto.

16. MINER hereby agrees not to transfer, assign, mortgage, or encumber with liens of any kind whatsoever the estate hereby granted, either in whole or in part, nor interest or associate any other person, corporations or associations in the estate hereby granted without prior written consent of the LESSOR first had and obtained.

17. It is hereby expressly understood between the parties hereto that the MINER is granted the right and privilege (as hereinabove limited) to remove coal from the hereinabove mentioned land by deep mining methods only and that the MINER shall not remove or cause to be removed coal from the hereinabove described land by the open pit or strip mining method. This agreement shall automatically terminate and cease to have any binding effect and force in the event that the MINER for any cause or reason whatsoever, not due to abnormal conditions, shall cease to mine and remove coal from the aforedescribed premises for a period of at least thirty consecutive days, and in the event of his failure to so mine, the LESSOR at its option may, without taking any legal procedure, declare this lease void and retake possession of the demised premises together with any and all improvements situated thereon.

18. The MINER agreed to permit ingress, egress and regress over the leased premises for all persons who have other agreements with the LESSOR for the mining of coal.

19. Any violation of any of the terms of this agreement by the MINER shall immediately cancel the same.

20. It is hereby expressly understood between the parties hereto that LESSOR may terminate this agreement completely and fully and without liability upon it or any further recourse against it, upon thirty days written notice given to MINER or by posting the same upon the lands hereinabove mentioned.

21. Should the presently located operation of the MINER on the above described tract interfere with other operations, LESSOR reserves the right to relocate such presently located operations of the MINER to a new location on the above described trace of land as may be available to and agreed upon by the MINER and in the event of such relocation the MINER will be given the first preference for a new location.

22. In the event of any dispute pertaining to mining matters between MINERS who have agreements from the LESSOR, the said matters shall be submitted to the county engineers whose decisions shall be final. A failure of any MINER to obey the decision of such engineers shall operate as a cancellation of this lease.

23. MINER agrees at all reasonable time to permit the LESSOR or its agents or engineers to go upon and inspect the demised premises and every part thereof.

24. MINER agrees to peacefully deliver up and surrender possession of the demised premises to the LESSOR at the expiration or sooner termination of this agreement or any renewal or extension thereof.

25. The MINER shall furnish to the LESSOR at least twice a year a correct map and survey of all his or its underground workings brought up to date. The first map shall be submitted on or before May 1, 1956, and each six months thereafter during the continuance of this agreement.

26. All rights and liabilities herein given to or imposed upon the respective parties hereto shall extend to and bind the several and respective heirs, executors, administrators, successors and assigns of the parties, except as other wise herein set forth; and if there shall be more than one MINER they shall all be bound jointly and severally by the terms, convenants and agreements herein and the word MINER shall be taken and deemed to mean each and every person or party mentioned herein, be the same one or more, and if there shall be more than one MINER any notice required or permitted by the terms of this agreement may be given by or to any one thereof and it shall

have the same force and effect as if given by or to all thereof. No rights, however, shall enure to the benefit of any assignee of MINER unless the assignment to such MINER has been first approved by LESSOR in writing as aforesaid.

27. All notices required to be given by the LESSOR to the MINER shall be sufficiently given if either mailed to the MINER at his last known address or if the same be posted on the demised premises. It is agreed that the LESSOR has let the demised premises in their present condition and without any representations on the part of the LESSOR, its employees, engineers or agents. It is understood by the MINER that in granting this lease LESSOR makes no representation of any kind as to whether there is any anthracite coal located on the leased premises.

28. This agreement, subject to all of its terms and conditions, shall be in effect until termination of lease subject, however, to the length of time during which the County of Northumberland remains the owner of said premises and subject, also, to the right on the part of the LESSOR to increase the royalties hereunder by a thirty day written notice to the MINER, provided that such increase shall not be more than five cents a gross ton during the term of this agreement. MINER further agrees, upon receipt of such notice increasing the royalty, to be bound by the same with the same force and and effect as through such increased amount were stated in this lease, and the failure to pay such increased royalty shall be considered a default under this agreement, subjecting the MINER to the penalties herein provided.

20. If the rent or royalty herein agreed to be paid shall remain unpaid when the same ought to be paid, MINER hereby empowers any Prothonotary or attorney of any court of record to appear for MINER in any and all actions which may be brought for rent and/or royalty as herein agreed to be paid by MINER, and to sign for MINER an agreement for entering in any competent court an amicable action or actions for the recovery of such rent or roy-

alty, and in said suits or said amicable action, to confess judgment against MINER for all or any part of the rent or royalty specified in this agreement and then unpaid, together with costs and with an attorney's commission of 10%. Such authority shall not be exhausted by one exercise thereof but judgment may be confessed as aforesaid, from time to time, as often as any of said rent or royalty shall fall due or be in arrears and such powers may be exercised as well after the expiration either of the original term and/or during any extension or renewal of this term, and may be exercised successively and as often as payments herein reserved may fall due. It is further agreed by MINER that a copy of this agreement shall be sufficient evidence of the same and may be filed in said amicable action.

30. Upon the breach of any of the covenants, obligations or agreements of this agreement, and when this agreement shall be determined by condition broken, either during the original term of the agreement or any renewal or extension thereof, and also when and as soon as the term hereby created or any extension thereof, shall have expired, the LESSOR may declare this agreement null and void and of no effect, and upon default, expiration or termination in any way herein provided, it shall be lawful for any attorney as attorney for the LESSOR to file an agreement for entering in any competent court an amicable action in ejection against MINER and all persons claiming under the MINER for the recovery by the LESSOR of possession of the herein demised premises for which this agreement or a copy thereof shall be his sufficient warrant. Whereupon, the Prothonolary or any other attorney of any court of record is hereby authorized and empowered by the MINER to appear for him and confess judgment or judgments in an amicable action or actions of ejectment against the said MINER and in favor of the LESSOR for the said premises or any other premises of the LESSOR then occupied by the MINER, and to direct the immediate issuance of a writ or writs of habere facias possessionen with clause of fieri facias for costs, waiving all irregularities, without notice and without asking leave

of court, and if after such action shall have been commenced, the same shall be determined and the possession of the premises hereby demised shall remain in or be restored to the MINER, LESSOR shall have the right upon any subsequent default or defaults or upon subsequent termination of this agreement as hereinbefore set forth, to bring one or more amicable action or actions from time to time as hereinbefore set forth, to recover possession of said premises and the said powers herein granted may be exercised as often as default shall occur and such authority shall not be exhausted by one exercise thereof.

31. All the remedies hereinbefore given to LESSOR and all rights and remedies given to it by law and equity shall be cumulative and concurrent. No determination of this agreement or the taking or recovering of the premises shall deprive LESSOR of any of its remedies or actions against the MINER for rent due at the time, or which under the terms hereof would in the future become due as if there has been no determination, or for sums due at the time or which under the terms hereof would in the future become due, nor shall the bringing of any action for rent or breach of covenant or resort to any other remedy herein provided for the recovery of rent be construed as a waiver of the right to obtain possession of the premises.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

ATTEST: COUNTY OF NORTHUMBERLAND

EXHIBIT B

DEEP MINING LEASE

THIS AGREEMENT, made and concluded the 26th day of October A.D. 1966 by and between the COUNTY OF NORTHUMBERLAND, acting by and through W. Fred Kehler, Fred E. Hoffman and Oscar Kehler its duly elected and qualified County Commissioners, who are hereby acting and contracting for and on behalf of the said County and also as Trustee for the various municipal sub-

divisions interested in the hereinafter described property, (hereinafter called LESSOR), Party of the First Part, and Split Vein Coal Company—R.D. #1, Paxinos, Pennsylvania Northumberland County, Pennsylvania, (hereinafter called MINER), Party of Second part:

WITNESSETH

IN CONSIDERATION of the convenants and agreements hereinafter contained, and in consideration of the sum of ONE ($1.00) DOLLAR each to the other in hand paid, the receipt whereof is hereby acknowledged, it is agreed by and between LESSOR AND MINER, the parties of this agreement, as follows:

1. LESSOR, insofar as it has the power and authority so to do, hereby leases and lets unto MINER the coal underlying the following described tract of land, together with the right and privilege of mining and removing the same, but not including any other mineral, gas or substance and not including the right to cut or remove timber, which premises are described as follows, to wit:

Being Independent Mining Operation No. C-692
In the No 8 & 9 Veins North and South dips
at or near East of Bridy's Bank
Located on Fulton Lands (James Jenkins) Tract 1371.5 acres.
Situate in the Township of Coal
More particularly described as follows:

More particularly described as follows:

The eastern limit of this lease is the boundry line between the Fulton Coal Company Tract and the McIntyre Tract. The western limit of this lease is 1200 feet west of the above boundry line.

The mining limit of this lease is for a distance of 1200 feet in the number 8 and 9 veins, north and south dips on the Fulton Lands (James Jenkins Tract), in Coal Township.

The lessee shall have a survey made within six months from the date of this lease and periodically or at any time the County Engineer should find it necessary and furnish the County Engineer with a print

showing the location of the surface openings and workings on this lease.

2. The LESSOR hereby grants, demises and lets unto the MINER the right and privilege of digging, mining and carrying away anthracite coal wholly at his own expense and cost in and from the described premises, in accordance with the terms and conditions of this agreement.

3. MINER hereby agrees, from and after the execution and delivery of this agreement, and until the MINER shall have finally ceased, whether voluntarily or involuntarily, mining upon any or all of the said premises, that MINER shall pay as rent and royalty to LESSOR weekly the sum of THIRTY FIVE ($.35) CENTS per gross ton of two thousand two hundred forty (2,240) pounds of raw coal removed from said land. It is understood that the term "raw coal" as used herein shall mean the material taken from the ground, prior to any preliminary cleaning and prior to the time when it shall be prepared in any manner whatsoever.

The MINER agrees to pay the LESSOR the royalty for the said coal or have the same deducted and paid for him by the purchaser of said coal within one week from the time that the coal is mined and removed.

4. The MINER agrees to have all raw coal mined and removed from said tract delivered to any breaker designated by the LESSOR except that the MINER may, with prior consent in writing of the LESSOR, change breakers from time to time, and the LESSOR agrees not to unreasonably withhold its consent to change, provided, however that no coal shall be taken to a breaker outside of Northumberland County. The MINER furhter agrees that the part breaker operator to whom the coal is delivered shall deduct the herein specified royalty on the gross weight as herein specified upon the delivery of each load of raw coal removed from the said tract described herein.

5. All royalty or rent collected by the breaker operator on raw coal delivered from the tract herein described, shall be paid to the LESSOR together with a complete and adequate record of the royalty collected.

6. MINER agrees to have all raw coal mined and removed from the said tract weighed at scales by a duly licensed weighmaster of the Commonwealth of Pennsylvania. The scales to be used shall be selected by the MINER from the list of scales approved by the LESSOR and the MINER shall not take any coal to scales not approved by LESSOR.

7. MINER agrees to have all raw coal mined and removed from said tract weighed at the following approved scales, to wit:

(Name of Approved Scales)

3. MINER further agrees that in the event the MINER desires to weigh raw coal at scales other than the scales specified herein, the LESSOR shall be notified in writing of the desire of the MINER and the MINER shall not change scales until such change is approved by the LESSOR and then shall not change except to approved scales on the list of scales approved by the LESSOR.

9. The MINER agrees to keep complete and accurate records of all raw coal removed from the premises and agrees that the agents of the LESSOR shall have the right and privilege of inspecting said books and records at any time. This record shall include the daily gross tonnage of raw coal mined or removed from the said tract. The MINER also agrees to preserve and keep for two (2) years after termination of this lease, a duplicate weight slip for each and every ton of raw coal mined and removed from the said premises. The MINER also agrees to keep and maintain such records as shall be furnished by the LESSOR under this agreement.

10. MINER hereby agrees that the methods and manner of keeping records, making statements, reports and the time and place of payment of the royalties upon the coal mined and removed from the herein described hands may be changed at any time by the LESSOR.

11. MINER hereby agrees that it will work the land herein mentioned continuously and in a skillful and work-

manlike manner under the direction and subject to the approval of the LESSOR, its agents or engineers, to its fullest capacity, and to leave no merchantable coal abandoned or neglected which in the opinion of said agent or engineers can be taken out without injury to the mines or lands.

12. MINER hereby agrees to comply with all the laws of the United States of America and the Commonwealth of Pennsylvania and to secure any permits and licenses which may be required by the United States of America or Commonwealth of Pennsylvania and particularly from the Pennsylvania Department of Forests and Waters, before engaging in any mining under this lease.

13. MINER hereby agrees to protect and save harmless the LESSOR from all liability of whatsoever kind or nature which may be caused by, or which may flow from, the operations of said MINER upon said land.

14. This agreement shall in no way nullify, invalidate or impair in any way the title of the LESSOR, and payment of the royalties or rents hereunder shall in no way work or be construed as a redemption either in whole or in part, or as a sale of said land either in whole or in part; nor shall it be construed as an abandonment by the LESSOR of this land, but said tract of land shall remain in the hands of the County Commissioners as LESSOR and the payments made hereunder shall be payments in the nature of rent or royalty. The LESSOR and its said Commissioners, W. Fred Kohler, Fred E. Hoffman and George F. Perles, neither individually nor in any capacity assume any liability hereunder except to receive and turn over to the Treasurer of Northumberland County such moneys as are received hereunder, so that the County Treasurer may properly distribute them among the various municipal subdivisions interested in the said lands in such proportions as each may be entitled to under the law. It is further understood between the parties hereto that in the event of a sale of said lands by the County or a redemption in full of the said lands by those persons legally entitled to

redeem the same, that this lease shall then immediately terminate as well as all rights of the MINER hereunder.

15. It is expressly understood between the parties hereto that the MINER shall operate the lands herein leased as an independent contractor and not as the agent, servant or employee of LESSOR, and any provision in this agreement pertaining to supervision, inspection or instructions by LESSOR, its representatives, engineers, employees or agents, is not intended to, nor shall it be construed in any way, to create a master and servant relationship between the parties hereto.

16. MINER hereby agrees not to transfer, assign, mortgage, or encumber with liens of any kind whatsoever the estate hereby granted, either in whole or in part, nor interest or associate any other person, corporations or associations in the estate hereby granted without prior written consent of the LESSOR first had and obtained.

17. It is hereby expressly understood between the parties hereto that the MINER is granted the right and privilege (as hereinabove limited) to remove coal from the hereinabove mentioned land by deep mining methods only and that the MINER shall not remove or cause to be removed coal from the hereinabove described land by the open pit or strip mining method. This agreement shall automatically terminate and cease to have any binding effect and force in the event that the MINER for any cause or reason whatsoever, not due to abnormal conditions, shall cease to mine and remove coal from the aforedescribed premises for a period of at least thirty consecutive days, and in the event of his failure to so mine, the LESSOR at its option may, without taking any legal procedure, declare this lease void and retake possession of the demised premises together with any and all improvements situated thereon.

18. The MINER agrees to permit ingress, egress and regress over the leased premises for all persons who have other agreements with the LESSOR for the mining of coal.

19. Any violation of any of the terms of this agreement by the MINER shall immediately cancel the same.

20. It is hereby expressly understood between the parties hereto that LESSOR may terminate this agreement completely and fully and without liability upon it or any further recourse against it, upon thirty days written notice given to MINER or by posting the same upon the lands hereinabove mentioned.

21. Should the presently located operation of the MINER on the above described tract interfere with other operations, LESSOR reserves the right to relocate such presently located operations of the MINER to a new location on the above described tract of land as may be available to and agreed upon by the MINER and in the event of such relocation the MINER will be given the first preference for a new location.

22. In the event of any dispute pertaining to mining matters between MINERS who have agreements from the LESSOR, the said matters shall be submitted to the county engineers whose decision shall be final. A failure of any MINER to obey the decision of such engineers shall operate as a cancellation of this lease.

23. MINER agrees at all reasonable time to permit the LESSOR or its agents or engineers to go upon and inspect the demised premises and every part thereof.

24. MINER agrees to peacefully deliver up and surrender possession of the demised premises to the LESSOR at the expiration or sooner termination of this agreement or any renewal or extension thereof.

25. The MINER shall furnish to the LESSOR at least twice a year a correct map and survey of all his or its underground workings brought up to date. The first map shall be submitted on or before May 1, 1956, and each six months thereafter during the continuance of this agreement.

26. All rights and liabilities herein given to or imposed upon the respective parties hereto shall extend to and bind the several and respective heirs, executors, adminis-

trators, successors and assigns of the parties, except as other wise herein set forth; and if there shall be more than one MINER they shall all be bound jointly and severally by the terms, convenants and agreements herein and the word MINER shall be taken and deemed to mean each and every person or party mentioned herein, be the same one or more, and if there shall be more than one MINER any notice required or permitted by the terms of this agreement may be given by or to anyone thereof and it shall have the same force and effect as if given by or to all thereof. No rights, however, shall enure to the benefit of any assignee of MINER unless the assignment to such MINER has been first approved by LESSOR in writing as aforesaid.

27. All notices required to be given by the LESSOR to the MINER shall be sufficiently given if either mailed to the MINER at his last known address or if the same be posted on the demised premises. It is agreed that the LESSOR has let the demised premises in their present condition and without any representations on the part of the LESSOR, its employees, engineers or agents. It is understood by the MINER that in granting this lease LESSOR makes no representation of any kind as to whether there is any anthracite coal located on the leased premises.

28. This agreement, subject to all of its terms and conditions, shall be in effect until termination of lease subject, however, to the length of time during which the County of Northumberland remains the owner of said premises and subject, also, to the right on the part of the LESSOR to increase the royalties hereunder by a thirty day written notice to the MINER, provided that such increase shall not be more than five cents a gross ton during the term of this agreement. MINER further agrees, upon receipt of such notice increasing the royalty, to be bound by the same with the same force and and effect as though such increased amount were stated in this lease, and the failure to pay such increased royalty shall be considered a default under this agreement, subjecting the MINER to the penalties herein provided.

29. If the rent or royalty herein agreed to be paid shall remain unpaid when the same ought to be paid, MINER hereby empowers any Prothonotary or attorney of any court of record to appear for MINER in any and all actions which may be brought for rent and/or royalty as herein agreed to be paid by MINER, and to sign for MINER an agreement for entering in any competent court an amicable action or actions for the recovery of such rent or royalty, and in said suits or said amicable action, to confess judgment against MINER for all or any part of the rent or royalty specified in this agreement and then unpaid, together with costs and with an attorney's commission of 10%. Such authority shall not be exhausted by one exercise thereof but judgment may be confessed as aforesaid, from time to time, as often as any of said rent or royalty shall fall due or be in arrears and such powers may be exercised as well after the expiration either of the original term and/or during any extension or renewal of this term, and may be exercised successively and as often as payments herein reserved may fall due. It is further agreed by MINER that a copy of this agreement shall be sufficient evidence of the same and may be filed in said amicable action.

30. Upon the breach of any of the covenants, obligations or agreements of this agreement, and when this agreement shall be determined by condition broker, either during the original term of the agreement or any renewal or extension thereof, and also when and as soon as the term hereby created or any extension thereof, shall have expired, the LESSOR may declare this agreement null and void and of no effect, and upon default, expiration or termination in any way herein provided, it shall be lawful for any attorney as attorney for the LESSOR to file an agreement for entering in any competent court an amicable action in ejectment against MINER and all persons claiming under the MINER for the recovery by the LESSOR of possession of the herein demised premises, for which this agreement or a copy thereof shall be his sufficient warrant. Whereupon, the Prothonotary or any other attorney of any court of record is hereby authorized and

empowered by the MINER to appear for him and confess judgment or judgments in an amicable action or actions of ejectment against the said MINER and in favor of the LESSOR for the said premises or any other premises of the LESSOR then occupied by the MINER, and to direct the immediate issuance of a writ or writs of habere facias possessionen with clause of fieri facias for costs, waiving all irregularities, without notice and without asking leave of court, and if after such action shall have been commenced, the same shall be determined and the possession of the premises hereby demised shall remain in or be restored to the MINER, LESSOR shall have the right upon any subsequent default or defaults or upon subsequent termination of this agreement as hereinbefore set forth, to bring one or more amicable action or actions from time to time as hereinbefore set forth, to recover possession of said premises and the said powers herein granted may be exercised as often as default shall occur and such authority shall not be exhausted by one exercise thereof.

31. All the remedies hereinbefore given to LESSOR and all rights and remedies given to it by law and equity shall be cumulative and concurrent. No determination of this agreement or the taking or recovering of the premises shall deprive LESSOR of any of its remedies or actions against the MINER for rent due at the time, or which under the terms hereof would in the future become due as if there has been no determination, or for sums due at the time or which under the terms hereof would in the future become due, nor shall the bringing of any action for rent or breach of covenant or resort to any other remedy herein provided for the recovery of rent by construed as a waiver of the right to obtain possession of the premises.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

STRIPPING PERMIT
TO
EXPLORE FOR ANTHRACITE COAL

June 27, 1966

PERMISSION IS HEREBY GRANTED TO Split Vein Coal Company, R.D. #1, Paxinos, Penna. to explore for anthracite coal in accordance with existing mining laws on the Gray & Cleaver Tract (133 acre) in Coal Township, Northumberland County, Pennsylvania, for a period of 90 days from the date of this permit. This permission is granted at the sole cost, expense and liability of the person to whom the permit is granted and the County Commissioners assume no liability of any kind, whatsoever by granting this permit.

The location for which the right to exploration is granted on the said tract is several vein South dip.

In the event that anthracite coal is discovered during such 90 day period, and the person or persons to whom this permit is granted shall have the first opportunity to secure a mining lease on the premises.

This permit is issued on the assumption that the land on which the exploration is to be conducted is county owned land. No permission is granted to interfere with the other persons now mining on such county owned land.

NORTHUMBERLAND COURT COMMISSIONERS

EXHIBIT C

STRIPPING LEASE

THIS INDENTURE, made and concluded this 6th day of June, A.D., 1967, between COUNTY OF NORTHUMBERLAND, a municipal subdivision of the Commonwealth of Pennsylvania, by and through W. Fred Kohler, Fred E. Hoffman and Oscar Kehler, its duly elected and acting Board of County Commissioners hereby acting and contracting for said County and also as Trustee for the vari-

ous taxing districts interested in the hereinafter described land, hereinafter called lessor, First Party;

AND

Split Vein Coal Company
R.D. #1,
Paxinos, Penna.

hereinafter called Lessee, Second party.

WITNESSETH

Lessor does hereby grant unto Lessee, the right to strip mine and remove coal from the hereinafter described premises, for a term beginning on the 25th day of July, 1966 and ending on the Completion of lease, upon the conditions hereinafter set forth.

1. The land from which the coal is to be removed is described as follows, excepting and reserving therefrom, however, such rights as may have been acquired by any person, firm or corporation prior to the date of this lease:

This lease is for the right to strip the several veins on the Gray & Cleaver Tract (133 Acres) in Coal Township, Northumberland County, Pennsylvania.

Interference or encroachment on any other stripping lease or Independent Mining lease within the limits of this lease will not be permitted unless consented to by the stripping or mining lessee.

2. The payments hereinafter set forth and charged are and shall be construed to be a fixed, determined and established rental charge to be paid for the rights hereby granted, for the time and term designated in this lease agreement or sooner termination of the same, excepting the coal as and when removed from the ground shall become the property of LESSEE at and for the price and consideration hereinafter set forth.

3. LESSEE is granted the right to haul, convey and transport the raw coal stripped from the said premises over, through and across the above described premises and the highways appurtenent thereto and cover which

LESSOR has the right of ingress and egress for the purpose of marketing the coal so removed.

4. LESSEE shall not assign or transfer this lease contract or any part or portion thereof without the written consent and approval in writing of LESSOR having first been obtained.

5. LESSEE shall furnish, at his own expense and cost, all labor, material, plant tools and supplies, including gasoline and oil, shovels, grading equipment, trucks and any other necessary equipment and material necessary for the efficient operation and conduct of the strip mining of coal from the property herein described.

6. In consideration where of the said LESSEE covenants end agrees with the LESSOR to and as follows, to wit:

a. LESSEE shall and will pay the sum of thirty-five cents per gross ton of twenty two hundred forty (2240) pounds for each and every ton of raw coal stripped and removed from the demised premises. All such payments shall be paid to the LESSOR in weekly installments and each payment shall cover the preceding week. The payments shall be made to the LESSOR, County of Northumberland, at the office of the County commissioners at the Court House at Sunbury, Pennsylvania. It is understood that the term "raw coal", as used herein, shall mean the material taken from the ground prior to any preliminary cleaning and prior to the time when it shall be prepared in any manner whatsoever.

b. LESSOR reserves the right to increase the royalty hereunder by a 30 day written notice to the LESSEE, provided that such increase shall not be more than 5¢ a gross ton during the term of this agreement.

c. LESSEE on or before the tenth day of each month during the term and life of this Agreement, shall furnish LESSOR or its duly authorized agent, or representative, a statement of the daily gross tonnage of raw coal, stripped and/or removed from said tract of land during each and every day of the preceding calendar month; and such

statement shall be based upon records of all coal stripped and removed as aforesaid, kept by LESSEE and furnished to LESSOR. LESSEE hereby agrees to preserve and keep a duplicate wieght slip for each and every load of raw coal stripped and removed from the herein described land by himself or by his lessees and LESSOR through its duly authorized agents or representatives shall at all reasonable times have the right to examine and inspect such reports, records and weight slips.

d. LESSEE agrees to have all raw coal stripped and removed from the herein described lands, weighed at a scales by a duly licensed weightmaster of the Commonwealth of Pennsylvania, as shall be designated in writing by LESSOR.

e. LESSEE agrees that all coal stripped and removed from the herein described lands shall be delivered to such breakers, or preparation plants as may from time to time be designated in writing by LESSOR. Prior to any delivery of raw coal stripped or removed from the herein described land to a designated breaker or preparation plant, LESSEE shall obtain from the operator of the same and deliver to the LESSOR a written authority for the LESSOR, its representatives, engineers, agents or employees, from time to time to make a full and complete inspection of all books and records of said breaker or preparation plant pertaining to the delivery and preparation of coal at said plant during regular business hours.

f. It is expressly understood between the parties hereto, that LESSEE shall conduct his operations hereunder as an Independent Contractor and not as servant, agent or employee of the LESSOR, and any provisions in this lease agreement pertaining to supervision, inspection or instruction by LESSOR, its representatives, engineers, employees, or agents is not intended nor shall be construed to create a master and servant relationship between the parties hereto.

m. It is understood and agreed that, in cases where, in this agreement, the approval or direction of the said authorized agent is required, that such requirements are of

approval only and not of direction or management and that the said First Party shall not incur any responsibility by reason of acting as such authorized agent.

n. This lease is issued with the understanding that any persons now conducting deep mining operations or owning or operating utility lines on the premises shall be protected by LESSEE and his stripping operators. If the stripping operator desires to strip an area occupied by a deep mining operation or by utility lines, arrangements must first be made with the owner or operator of the deep mining operation or the utility line. These arrangements must be made by the stripping operator or else he must by-pass the deep mining operation or utility line so as not to disturb them.

o. It is understood that this Agreement shall in no way nullify or invalidate or impair the title of LESSOR, acquired at a Treasurer's Sale as aforesaid, and the payment of royalties hereunder shall in no wise work a redemption, either in whole or in part, of the said tract of land, nor shall it be construed as an abandonment to LESSOR in its land, but said tracts of land shall remain in the hands of the County Commissioners and on records in their office as unredeemed land.

p. It is hereby expressly understood between the parties hereto, the neither LESSOR nor W. Fred Kohler, Fred E. Hoffman and Oscar Kehler, individually nor in any capacity assume any liability hereunder except to accept and turn over and properly distribute among the various municipal subdivisions the proportionate share of said royalties as shall be due to the same under the terms of this agreement. And it is further understood between the parties hereto, that LESSOR and said W. Fred Kehler, Fred E. Hoffman and Oscar Kehler in entering into this agreement are acting only to the extent of their power and authority under the Laws of the Commonwealth of Pennsylvania, as the same is now declared or may be determined at any future time and are granting to LESSEE only such rights and privileges as they are able to do thereunder.

7. Regulating contract breaches and forfeitures, it is provided and agreed as follows:

a. That should the payments aforesaid be at any time in arrears and unpaid, the said LESSOR may enforce payment thereof, by distress upon the goods and chattels of the said LESSEE, as fully as is by law given to landlords to distrain and sell in ordinary cases of rent in arrears; and, the said LESSEE hereby waives the benefits of any law or laws exempting such goods and chattels, or any part thereof, from sale under such distress, or exemption laws.

b. That if LESSEE shall fail to make the payments herein provided upon the day and time when the same are due and payable, it may be lawful for the LESSOR to reenter upon the described premises and take possession and hold the same until all arrears of rent are paid and discharged by the LESSEE.

c. That for any breach of non-performance of any of the covenants, conditions or requirements contained herein, which on the part of said LESSEE, his successors and assigns, are to be performed, fulfilled and kept, this lease shall be and become absolutely void and of no effect, and it shall and may be lawful for the said LESSOR, his successors and assigns, to at once re-enter and take possession of the said described premises and appurtenances; and in such case the said LESSEE, for himself, his successors and assigns, hereby authorized any attorney of any court to record in the Commonwealth of Pennsylvania to appear for him and confess judgment in ejectment against him in favor of LESSOR, with a full release of all claims and damages against said attorney by reason of his so doing; and thereupon a writ of habere facies possessionen, with clause of fieri facias for costs, damages and rentals and payments in arrears, may be issued (without asking leave of Court) to put the said LESSOR in possession of the said promises, with the appurtenances, without stay of execution, certiorari, or appeal or other relief, in law or equity, PROVIDED HOWEVER, said judgment shall not prevent

said LESSOR from preceeding to recover any rent due by distress or otherwise and that said judgment shall not bar LESSOR from any action for damages for any loss sustained by any breach of this lease, but that the LESSOR may have and use any or all such remedies as herein provided if he may deem proper. The remedies herein provided may be enforced either separately or concurrently.

d. LESSEE hereby authorized and empowers any attorney of any court of record in Pennsylvania or elsewhere to appear for and to enter judgment against him for any and all rentals, and other sums agreed hereunder to be paid, which may be due and payable, whenever and as often as the same have not been paid, without stay of execution, until the same have been paid and with 10% added for collection fees and he also waives the right of inquisition on any real estate that may be levied upon to collect the said judgment or judgments and he does voluntarily condemn the same and authorized the Prothonotary to enter upon the fieri facies whenever same may be issued, his said voluntary condemnation, and he further agrees that said premises may be sold on a fieri facias and he hereby waives and releases all relief from any and all appraisement, stay or execution laws of any state now in force or hereafter to be passed; that these exemption conditions and provisions shall apply also to any other judgments in ejectment and habere facias possessionem thereon or any other judgments or actions undertaken by LESSOR to enforce the provisions, covenants, and agreements under this lease.

e. LESSEE shall deliver up peaceable possession of the said premises to LESSOR, upon the expiration or sooner termination of this lease.

9. It is hereby expressly understood between the parties the LESSOR may terminate this agreement completely and fully and without any liability upon it or any further recourse against it, upon thirty days written notice given to LESSEE or by posting the same upon the lands herein-above mentioned.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals this 9th day of June, 1967.

COUNTY OF NORTHUMBERLAND

Chief Clerk

Commissioners

WITNESSES:

EXHIBIT "D"

EQUIPMENT	*PURCHASE PRICE*
66 Mack Tractor	$ 19,057.50
1964 Cadillac (Used) 75% Business	3,294.07
1960 Dump Truck (Used)	4,950.00
26 A St. Dump T/A 4408	4,745.68
Radios & Installation	987.11
Motors & Coal Scoop	1,844.75
Rolls	2,450.00
Space Heater & Speed Reducer	536.10
Trailer	800.00
Trailer	6,009.48
Trailer (Used)	500.00
Trailer	6,810.62
Truck (Used)	7,129.67
Truck Diesel	13,344.69
Mack Truck—Trailer Rig	18,000.00
Pick-Up Truck	3,524.30
Tractor	16,700.00
Truck—Studebaker	1,700.00
Truck—White	2,000.00
Truck—Fuel (Used)	450.00
Breaker	22,000.00
Coal Hole	1,000.00
Loader	10,943.00
Loader (Used)	8,790.00
Loader	11,162.00
Coal Hole Equipment	$ 3,435.00
Crusher	2,500.00

EQUIPMENT	*PURCHASE PRICE*
Hoist, Generators, Pumps, etc.	4,000.00
Compressor	2,000.00
Compressor	2,225.30
Generator	3,338.16
Generator	9,275.34
Conveyor Chains	5,000.00
Conveyor Chains	4,665.00
Pipe & Pumps	1,218.00
Coal Washing Table	312.15
Power Saws & Motor	207.50
Fan	200.00
Overhaul Allis-Chalmer	3,092.26
Overhaul Loader	3,504.17
Conveyor Chain	1,053.60
Conveyor	2,500.00
Pump Motor Pipes	1,385.20
Steel Tracks & Carts	1,789.15
Payloader	13,000.00
Rolls	2,200.00
Breaker Stoker	2,115.35
Garage—Cinder Block	8,577.23
Drilling Water Well	1,042.00
Water Pump & Installation	1,810.00
Welder	$ 2,250.00
Batteries	3,620.64
Cat. 950 Traxcavator	24,078.76
Shovel #8105	18,500.00
Gould Pump	2,500.00
Cat. D.9 Tractor (Used)	30,012.50
Air Compressor	2,500.00
Power Shovel	11,000.00
Bulldozer	12,000.00
Conveyor Chain	1,701.00
Wench (Used)	600.00
Screening Plant	11,519.80
Electric Sets	2,832.50
Conveyor Chain (Used)	450.00
Quaker State Pump	424.25
TOTAL	$373,163,83

IN THE UNITED STATES COURT OF CLAIMS

No. 403-75

ELWOOD SWANK AND RITA SWANK, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the following facts may be accepted as true for the purpose of this case. The parties reserve the right to argue the relevance of or materiality of any matter contained herein.

1. On October 26, 1962, John Stanley Perles, a sole proprietor, entered into a Deep Mining Lease for the extraction of anthracite coal with the Commissioners of the County of Northumberland, Pennsylvania. Taxpayer did not enter into this lease. A true and correct copy of the said lease is attached hereto as Exhibit "E" and made a part hereof. On July 16, 1963, the said John Stanley Perles entered into a partnership agreement with Taxpayer for the mining, marketing and sale of anthracite coal. A true and correct copy of the said partnership agreement is attached hereto as Exhibit "F".

2. The property described in the Deep Mining Leases (October 24, 1964, and October 26, 1966) and the Stripping Lease (June 6, 1967) here in suite, was not redeemed under Pennsylvania redemption laws by payment of overdue taxes by a party in interest.

LLOYD R. PERSUN
Attorney for Plaintiff

M. CARR FERGUSON
Assistant Attorney General

JAMES L. MALONE III
Attorneys for Defendant

FINDINGS OF FACT

1. Plaintiffs are Elwood and Rita Swank, husband and wife, residing at R.D. No. 1, Box 85 D, Paxinos, Pennsylvania. They owned and operated a sole proprietorship t/a Split Vein Coal Company throughout 1966 and during the first 4 months of 1967. On May 1, 1967, the assets of the sole proprietorship were transferred to Split Vein Coal Company, Inc., in a tax-free incorporation pursuant to Section 351 of the Internal Revenue Code of 1954, as amended. Hereafter the term plaintiff shall mean both husband and wife, or their sole proprietorship.

2. Plaintiff timely filed joint 1966 and 1967 Federal individual income tax returns with the District Director, Internal Revenue Service, Mid-Atlantic Region, in Philadelphia, Pennsylvania, and paid the tax shown to be due thereon.

3. In his joint 1966 and 1967 Federal individual income tax returns, plaintiff claimed as a deduction from ordinary income a deduction for depletion of coal resources in which he claimed an economic interest in 1966 and in the first third of 1967.

4. After audit, the government disallowed the deductions referred to in paragraph 3 above and, as a result thereof, assessed deficiencies against plaintiff for the years 1966 and 1967 in the aggregate amount of $30,587.84 which was paid to the government under protest, together with assessed interest in the aggregate amount of $3,663.

5. On or about February 25, 1974, plaintiff filed timely claims for refund for the years 1966 and 1967. The claims for refund were disallowed. Plaintiff timely filed this appeal.

6. At all times material hereto plaintiff was engaged in mining and strip mining anthracite coal as lessee of various mining tracts in the Northumberland County, Pennsylvania area. Plaintiff strip mined and deep mined only from leased coal lands. He purchased and owned the machinery and equipment used in his mining operations,

and took depreciation deductions on such machinery and equipment. See finding 21, *infra*.

7. In deep mining the plaintiff excavated shafts through the overburden into veins of coal. He then conveyed his employed miners in buggies on rails through the shaft, to the coal face, where, using explosives, picks and shovels they extracted coal which was carried to the surface on the railed buggies. Thence it was trucked into plaintiff's breaker where, as in the case of strip mined coal, it was cleaned, sorted, sold to the general public, and carried by plaintiff's trucks to plaintiff's siding (see finding 21) where it was loaded onto railroad cars. A breaker (sometimes "tipple") removes the slate and rock and then sorts the coal into seven sizes for public sale at prices varying with its quality and prevailing market conditions.

8. During the tax years in dispute Northumberland County, Pennsylvania, owned over 17,500 acres of coal property in the county which it had acquired at sales for delinquent taxes. Two of the properties had been leased, separately, to Edward Gusick, and to the Kozar Coal Company, as deep mine operations. These two leases were cancelled on October 24, 1964 and October 26, 1966, respectively, and immediately re-leased to plaintiff because plaintiff had bought out the interests of Gusick (for $12,085, including the assumption of remaining payments of $5,085.50 on generating equipment, and the balance for Gusick's existing excavation on the property) and of Kozar (for $7,000, including equipment and existing excavation). Neither of the two properties had been redeemed by their former owners from the county by payment of tax arrears under Pennsylvania laws.

9. During 1966 and 1967 the plaintiff deep mined coal under the lease of October 24, 1964, referred to in finding 8. The lease was terminated in May 1968 when heavy rainfall caused a mountain slide which closed the mine. Plaintiff never extracted coal under the lease of October 26, 1966, and it was terminated for cause in November 1969 due to plaintiff's failure to mine.

10. During 1966 and 1967 the plaintiff strip mined coal

from land he leased on July 25, 1966, from Northumberland County. The property had not been previously mined. He strip mined by using his power shovel to remove the overburdening soil and terrain covering the underlying coal (hereinafter the "overburden"). The power shovel then "stripped" the exposed coal from the earth's surface and placed it in large piles next to loaders. The piled coal then was conveyed by the loaders into trucks which hauled the coal from the leased lands to a breaker, where the coal was cleaned and sorted. From the breaker, the coal was sold to the general public on the open market.

11. Plaintiff paid Northumberland County royalties of $7,545.10 in 1966 and $6,854.05 in 1967 on coal which was mined under the leases referred to in findings 8 and 10. The royalties were fixed in the leases at 35 cents per gross ton of coal removed. The county would receive weigh slips from the breaker verifying the tonnage sold, and plaintiff would remit to the county the royalties from each sale.

12. Each of the three leases between plaintiff and Northumberland County referred to in findings 8 and 10 herein, which was good until terminated, contained several provisions for its automatic termination in the event of sale of the lands by the county[1] or redemption of the lands by tax delinquent former owners, or the lessee's failure to mine and remove coal for 30 consecutive days unless due to abnormal conditions. Other clauses provided for automatic cancellation of the leases for violation of any of their terms. Finally, a clause in each lease provided the following or its substantial equivalent:

> It is hereby expressly understood between the parties hereto that LESSOR may terminate this agreement completely and fully without liability upon it or any further recourse against it, upon thirty days written notice given to MINER or by posting the same upon the lands hereinabove mentioned.

---

[1] Northumberland County has never sold a fee interest in lands acquired for unpaid taxes, for fear of criticism over selling such land if valuable minerals were later discovered.

A similar or identical provision for 30-day termination notice was included in all coal mining leases granted by Northumberland County From January 1, 1956 to May 31, 1969. It is reasonable to construe the clause as authority by Northumberland County to terminate the lease without cause on 30 days notice. However, the leases were "administered" leases, that is, they were standard forms with "boiler-plate" clauses prepared by the lessor which were not subject to negotiation.

13. The language of the deep mining leases referred to in finding 8 is identical to the language of the lease involved in *Whitmer* v. *Comm'r.*, 28 T.C.M. 1480 (1969), *aff'd.* 443 F.2d 170 (C.A. 3 Cir. 1971), except for the name of the lessee, description of the property, and the termination date.

14. Taxpayer was under no obligation to sell the coal to the lessor or to any other party. He could sell the coal to whomever he pleased and at whatever price he could obtain.

15. (a) Since 1956 it has been the publicly announced policy that the Northumberland County Commissioners would never terminate a mining lease except for the lessee's failure to mine for an unreasonably long period of time, or for the lessee's failure to pay royalties, or for the lessee's cheating on the royalty. Every lessee received the same form lease from the county, and in each case it was with the stipulation that the county would not cancel except for cause. The reason for this was that the county commissioners recognized that they could not expect an independent miner to invest time and considerable capital in the development of county coal lands without some assurance that, if he conformed to the terms of the lease, he would be allowed to recover his investment and make a profit on his mine.

(b) This policy was based on various charges made during the primary election for Northumberland county commissioners held in the early 1950's to the effect that coal leases were being granted on a basis of political favoritism. As a result of these charges the incumbent

county commissioners were defeated in their bids for reelection. For this reason the county commissioners would not enter into leases without a 30-day termination clause so that there might be no question of political favoritism or criticism by the public of the actions of the county commissioners in leasing coal lands.

(c) Statements to the effect that Northumberland County would not terminate a lease except for cause were made to various individual mine operators (including taxpayer), in public meetings of the commissioners, and reported in the press. However no assurance was given that the county commissioners *could* not cancel a lease without cause.

16. Interests in county mining leases and mining operations were frequently bought and sold by independent miners. The county's policy in such cases was to either transfer the lease, or to prepare a new lease for the future lessee. The county received no consideration for the transfer of an old lease to a new lease. Nor was it concerned if the present lessee received consideration for the transfer from the future lessee.

17. Plaintiff is known as an independent coal miner. He is so classified because the coal mining operations of independent coal miners are generally small operations as compared to the large corporate operations which at one time flourished in the anthracite coal areas of Northumberland County. Independent coal miners produce coal from public coal lands, and the operations are under the active direction of the owners of the mine. As such, plaintiff belongs to the Independent Miners, Breakermen and Truckers Association of Shamokin, Pennsylvania, an association of similarly situated miners and other businessmen engaged in the mining, processing, trucking and sale of anthracite coal.

18. Plaintiff had 14 employees in both 1966 and 1967.

19. Plaintiff spent $6,500 to build access roads to his strip mine from the public highways. This expense was depreciated on plaintiff's Federal income tax returns.

20. Plaintiff's breaker referred to in finding 7, *supra*, was located 5 or 6 miles away from the mines involved in this proceeding. It was purchased by plaintiff about 1959 for $22,000, and was improved by plaintiff by 1966 at a cost of $96,477.27, according to his testimony.[2]

21. In either 1962 or 1963 plaintiff, at a cost of $10,000, purchased a railroad siding located approximately 1,000 feet from his breaker. This railroad siding was connected to the Penn Central Transportation Company railroad line and, during the years in suit, was used in plaintiff's mining operations. During the years in suit plaintiff leased the land where the siding was located for a rental of $600 per year.

22. The parties stipulated that plaintiff purchased equipment for $373,163.83 for use at relevant times in the mining operations under the leases referred to in these findings. However, the evidence indicates that this equipment was not used exclusively for plaintiff's mining operations at the mines which are the subject of this suit. To an unascertainable extent the equipment listed was also used in connection with the processing of coal purchased by plaintiff from other mines, as well as in plaintiff's separate trucking businesses. Thus, plaintiff's 1967 income tax return, which states his occupation as "mining" and "trucking", claims depreciation of $5,705 for the mining business, and $11,860.88 for the trucking business, the one being for 4 months of 1967 and the other 8 months. The depreciation schedule claiming the depreciation of equipment used in the trucking business shows that the acquisition cost of the depreciated equipment was $139,827.71, which would infer that at that time plaintiff's depreciable equipment used in the mining business had a cost basis of $233,336.12 ($373,163.83—$139,827.71). According to the depreciation schedules all of the equipment

---

[2]The acquisition cost of the breaker of $22,000 in January 1959 is listed in the depreciation schedule attached to plaintiff's 1967 tax return, but not the improvements of $96,477.27. It is assumed that normally such improvements, if made, would have been capitalized and depreciated, but if so it does not appear in the 1967 schedule.

depreciated had been acquired at various times from January 1959 through April 1967. In other words, it would be misleading to interpret the parties' stipulation to mean that plaintiff purchased and used $373,163.83 worth of equipment exclusively for use in connection with the mining and sale of coal under the leases involved in this suit.

CONCLUSION OF LAW

Upon the trial judge's findings and opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff is entitled to recover taxes and interest assessed, plus interest as provided by law. The amount of plaintiff's recovery should be determined pursuant to Rule 131(c)(2).

GENERAL

BLACK HAWK COAL CORPORATION, INC.
DOING BUSINESS UNDER THE NAME OF
BLACK HAWK COAL COMPANY, INC.

v.

THE UNITED STATES

Income taxes

January 24 1977
5 COPIES OF PETITION TO DEFENDANT.
$164,237.43
Feds Creek, KY and
Grundy, VA

GENERAL

Jan 24 1977	Filing fee of $10 paid by plaintiff.
Feb 9 1977	Notice of reference to Trial Judge C. Murray Bernhardt filed. Copy to parties.
Mar 25 1977	Defendant's answer filed. Copies (5) to atty.
Oct 31 1978	Stipulation of facts filed by defendant. Copy to atty. (2)
Nov 1 1978	Trial Judge's memorandum report returning case to court on stipulation facts filed. Copies to parties.
Nov 30 1978	Plaintiff's motion for extension of time (to February 14, 1979) to fill its brief filed. Copies (2) to deft. ALLOWED DEC 1 1978.
Feb 23 1979	Plaintiff's brief filed. Copies (5) to deft. (BLOC).
Mar 26 1979	Defendant's brief filed. Copies (5) to atty.
Apr 16 1979	Plaintiff's reply brief filed. Copies (5) to deft.
May 15 1979	See 400-77 for defendant's motion or order directing consolidation.
Jun 4 1979	See 400-77 for argument and submission.

Jul 18 1979	See 403-75 for Court Opinion.
Dec 3 1979	Stipulation for entry of judgment filed. Copies (2) to atty.
Dec 4 1979	Trial Judge's memorandum report for judgment filed. Copy to parties.
Dec 7 1979	Court filed order entering judgment for plaintiff in the sum of $164,141.03 plus statutory interest. Copy to parties.
Dec 7 1979	Certified transcript of judgment mailed to attorney of record.

IN THE UNITED STATES COURT OF CLAIMS

No. 49-77

BLACK HAWK COAL CORPORATION, INC.
DOING BUSINESS UNDER THE NAME OF
BLACK HAWK COAL COMPANY, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

PETITION

TO THE HONORABLE THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE COURT OF CLAIMS:

1. Plaintiff, Black Hawk Coal Corporation, Inc., is a corporation chartered under the laws of the Commonwealth of Kentucky on April 7, 1964, with its registered office at Feds Creek, Kentucky and its business office in Grundy, Virginia. Following its incorporation the company transacted its business under the name of Black Hawk Coal Company, Inc. Said corporation was authorized to issue 250 shares of common stock with a par value of $100.00 per share. One hundred shares were issued and outstanding during the calendar years ending December 31, 1970, December 31, 1971 and December 31, 1972. The following is a list of the shareholders and the number of shares owned by each:

E. M. Bane, Sr.	18 shares
E. R. Bane	1 share
Eugene M. Bane, Jr.	40 shares
Betty M. Worley	40 shares
William D. Bane	1 share
Total	100 shares

2. Said corporation under the name of Black Hawk Coal Company, Inc., filed its income tax returns for the calendar years ending December 31, 1970 and December 31, 1971, with the Internal Revenue Service, Cincinnati, Ohio and its December 31, 1972 return with the Internal Revenue Service Center, Memphis, Tennessee, and paid the

tax shown thereon to be owing in the respective amounts of $57,236.65, $61,296.84, and $42,461.31.

3. This action is brought pursuant to Sections 1346 and 1491 of the Judicial Code (28 U.S.C.A. Sections 1346 and 1491) against the United States of America, as Defendant.

4. During the calendar years ending December 31, 1970, 1971, and 1972, Plaintiff, Black Hawk Coal Corporation, Inc., was engaged in the business of mining and producing coal. Said company operated under a Lease dated the 20th day of February, 1964, between Kentland Coal & Coke Company Division of the Berwind-White Coal Mining Company, a Pennsylvania corporation, Lessor, and Eugene M. Bane of Grundy, Virginia, Lessee. Said Lease was assigned by E. M. Bane to the said Black Hawk Coal Corporation, Inc., pursuant to the "Initial Plans for the Organization of Black Hawk Coal Corporation" as shown in the Minute Book of said corporation, dated February 21, 1964.

5. Said Lease granted to the Lessee the exclusive right to mine to exhausion, subject to the terms of said Lease, certain specific seams of coal under seven parcels of land in Pike County, Kentucky.

6. In consideration thereof the Lessee agreed to pay to the Lessor as rent the sum of Five Thousand and No/100 Dollars ($5,000.00) per year in monthly installments and a tonnage royalty of twenty-five cents ($.25) per ton for all coal mined from the leased premises, to be credited against the said rental.

7. As a result of the Lease Agreement and assignment hereinabove referred to, the said Black Hawk Coal Corporation, Inc., acquired an economic interest in the coal which it produced under said Lease Agreement and was entitled to percentage depletion under Sections 611 and 613 of the Internal Revenue Code of 1954.

8. No claim for percentage depletion on the coal extracted has been claimed by the Lessor or by any other person, firm or corporation. The sole claimant to said percentage depletion deduction was Black Hawk Coal Corporation, Inc.

9. Upon examination, the Commissioner of Internal Revenue erroneously disallowed the depletion deduction claimed by the Plaintiff.

10. On or about the 28th day of March, 1975, Plaintiff, Black Hawk Coal Corporation, Inc. paid by three checks in the name of Black Hawk Coal Co., Inc. the deficiency resulting from the disallowance of depletion for the calendar years ending December 31, 1970, December 31, 1971, and December 31, 1972, in the amounts of $67,128.52, $60,329.38, and $37,199.53 respectively, which included assessed interest as provided by law.

11. On or about June 2, 1975, Plaintiff, Black Hawk Coal Corporation, Inc., filed separate claims for refunds in the name of Black Hawk Coal Company, Inc. for the calendar years ending December 31, 1970, December 31, 1971, and December 31, 1972, and mailed same to the Internal Revenue Service Center, 3131 Democrat Road, Memphis, Tennessee, in the respective amounts of $54,026.98, $51,018.50, and $32,719.89*, plus assessed interest in the amounts of $13,101.54, $9,310.88, and $4,059.64 respectively. These claims were based on the fact that Black Hawk Coal Corporation, Inc. had the economic interest in the coal in place and was entitled to the depletion claimed for the calendar years ending December 31, 1970, December 31, 1971, and December 31, 1972.

12. The District Director of Internal Revenue on January 7, 1976, by three separate letters addressed to Black Hawk Coal Company, Inc., Grundy, Virginia, and sent by certified mail, officially disallowed the claims for refund for the tax period ending December 31, 1970, in the amount of $54,026.98, for the tax period ended December 31, 1971, in the amount of $51,018.50; and for the tax period ending December 31, 1972, in the amount of $32,719.89 and the interest paid thereon.

---

* The taxpayer concedes the adjustment to interest income which increased taxpayer's taxable income in the amount of $875.00.

13. By reason of the Commissioner's failure to allow claims for refund of Plaintiff for the years hereinafter set out, the following amounts are now wrongfully withheld from the Plaintiff without its consent and against its will.

Year Ended	*Amount*	*Interest*	*Total*
December 31, 1970	$54,026.98	$13,101.54	$67,128.52
December 31, 1971	$51,018.50	$9,310.88	$60,329.38
December 31, 1972	$32,719.09	$4,059.64	$36,779.53

14. The amounts claimed represent the additional income taxes and interest paid by the Plaintiff to the District Director of Internal Revenue as a result of the disallowance of the claimed percentage depletion to Black Hawk Coal Corporation, Inc., for the said calendar years ending December 31, 1970, December 31, 1971, and December 31, 1972.

15. No action has been had on said claims in the United States Congress, or any of the Departments of the government, nor in any other Judicial Proceeding, including the Tax Court of the United States; no other person, firm or corporation other than Plaintiff is the owner thereof or interested therein; no assignment or transfer of these claims or any part thereof or interests therein has been made. Plaintiff is justly entitled to the amounts herein claimed from the United States after allowing all just credits and off-sets. The Plaintiff has at all time borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement against said Government.

WHEREFORE, Plaintiff, Black Hawk Coal Corporation, Inc., doing business under the name of Black Hawk Coal Company, Inc., asks judgment against the United States of America in the sum of $67,128.52 for the tax period ended December 31, 1970; $60,329.38 for the tax period ended December 31, 1971; and $36,779.53 for the tax period ended December 31, 1972, making a total sum due and payable for said three years of $164,237.43, together

with costs and interest to the extent allowed by law, and for such other and further relief as may to this Honorable Court seem just and proper.

LeRoy Katz
Katz, Kantor, Katz, Perkins &
Cameron
P. O. Box 727
Bluefield, WV 24701
Attorney for Plaintiff

IN THE UNITED STATES COURT OF CLAIMS

No. 49-77

BLACK HAWK COAL CORPORATION, INC., DOING BUSINESS UNDER THE NAME OF BLACK HAWK COAL COMPANY,

Plaintiff

v.

THE UNITED STATES,

Defendant

ANSWER

The defendant, the United States, answers the plaintiff's petition by denying each and every allegation contained therein which has not been admitted, qualified, or expressly referred to below.

The defendant further:

1. Admits that the plaintiff, Black Hawk Coal Corporation, Inc., is a corporation chartered under the laws of the Commonwealth of Kentucky, but states that its trial attorney is presently without sufficient knowledge or information to either admit or deny the remaining allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. States that jurisdiction is conferred upon this Court by virtue of 28 U.S.C. §1491.

4. Admits the allegations contained in the first two sentences of paragraph 4, but states that its attorney is presently without sufficient knowledge or information to either admit or deny the allegations contained in the last sentence of paragraph 4.

5. Denies the allegations contained in paragraph 5.

6. States that the agreement, dated February 20, 1964, betwen Kentland Coal and Coke Company Division of the Berwind-White Coal Mining Company, lessor, and Eugene M. Bane, lessee, speaks for itself.

7. Denies the allegations contained in paragraph 7.

8. States that its attorney is presently without sufficient knowledge or information to either admit or deny the allegations contained in paragraph 8.

9. Admits that the Commissioner of Internal Revenue disallowed the depletion deduction claimed by the plaintiff, but denies that such disallowance was erroneous.

10. States that the plaintiff was timely and properly assessed on April 15, 1975, additional tax and interest for its 1970, 1971, and 1972 tax years as follows:

Year	*Tax*	*Interest*	*Total*
1970	$54,026.98	$13,117.45	$67,144.43
1971	$51,018.50	$9,325.90	$60,344.40
1972	$33,139.89	$4,059.64	$37,199.53

In respect to 1970, payments of $67,128.52 (received April 2, 1975) and $15.91 (received May 7, 1975) were made in satisfaction of the plaintiff's 1970 tax liabilities. In respect to 1971, payments of $60,329.38 (received April 2, 1975) and $15.02 (received May 7, 1975) were made in satisfaction of the plaintiff's 1971 tax liabilities. In respect to 1972, a payment of $37,199.53 (received April 2, 1975) was made in satisfaction of the plaintiff's 1972 tax liability.

11. States that the plaintiff filed three claims for refund (Forms 843) dated June 2, 1975, one for each of the three years in question, as follows:

Year	*Date Received*	*Amount (Tax)*
1970	June 9, 1975	$54,026.98
1971	June 5, 1975	$51,018.50
1972	June 11, 1975	$32,719.89

Defendant denies the grounds upon which those claims for refund rest.

12. Admits the allegations contained in paragraph 12.

13. Denies the allegations contained in paragraph 13.

14. Admits the allegations contained in paragraph 14.

15. States that its attorney is presently without sufficient knowledge or information to either admit or deny the allegations contained in paragraph 15, except denies that the plaintiff is justly entitled to the amounts herein claimed from the United States after allowing all just credits and offsets.

WHEREFORE, defendant prays that the petition be dismissed with costs assessed against the plaintiff.

Respectfully submitted,

MYRON C. BAUM
Acting Assistant Attorney General

C. PATRICK DERDENGER
Attorney

MARCH 25, 1977

IN THE UNITED STATES COURT OF CLAIMS

No. 49-77

BLACK HAWK COAL CORPORATION, INC.

DOING BUSINESS UNDER THE NAME OF
BLACK HAWK COAL COMPANY, INC.,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

STIPULATION OF FACTS

It is hereby agreed and stipulated between the parties hereto that, for the purpose of this case only, the following may be accepted and adopted as facts and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part hereof:

1. Plaintiff, Black Hawk Coal Corporation, Inc., is a corporation chartered under the laws of the Commonwealth of Kentucky on April 7, 1964, with its registered office at Feds Creek, Kentucky, and its business office in Grundy, Virginia. Said corporation was authorized to issue 250 shares of common stock with a par value of $100.00 per share. One hundred shares were issued and outstanding during the calendar years ending December 31, 1970, December 31, 1971 and December 31, 1972. The following is a list of the shareholders and the number of shares owned by each:

E.M. Bane, Sr.	18
E.R. Bane	1
Eugene M. Bane, Jr.	40
Betty M. Worley	40
William D. Bane	1
TOTAL	100

2. Said corporation under the name of Black Hawk Coal Company, Inc., filed its income tax returns for the calendar years ending December 31, 1970, and December 31, 1971, with the Internal Revenue Service, Cincinnati, Ohio, and its December 31, 1972, return with the Internal Revenue Service Center, Memphis, Tennessee, and paid the tax shown thereon to be owing in the respective amounts of $57,236.65, $61,296.84 and $42,461.31. True copies of the returns are attached hereto as Exhibits No. 1, 2 and 3, respectively.

3. The plaintiff corporation during the years involved, was engaged in the drift mining of coal under an agreement entitled "Agreement of Lease" dated February 20, 1964. Said agreement was between Kentland Coal & Coke Company Division of the Berwind-White Coal Mining Company, a Pennsylvania corporation, Lessor and Eugene M. Bane of Grundy, Virginia, Lessee. A true copy of said Lease is attached hereto as Exhibit No. 4. Said Lease was assigned by E.M. Bane to the said Black Hawk Coal Corporation, Inc., pursuant to the "Initial Plans for the Organization of Black Hawk Coal Corporation," as shown in the Minute Book of said corporation, dated February 21, 1974. A copy of said "Initial Plans for the Organization of Black Hawk Coal Corporation" is attached hereto as Exhibit No. 5.

4. The plaintiff corporation has mined coal continuously from said property from 1964 through the taxable years herein involved.

5. The Lease Agreement hereinabove referred to is attached hereto as Exhibit No. 4. The copy of Exhibit No. 4 has thereon certain lines which have been underlined, on pages 3, 5, 6 and 8. Also appearing on page 3 is a star on the left-hand side and an arrow on page 8 of said Lease. None of the underlining, the star nor the arrow have any bearing upon the Agreement and are not to be considered in the examination of this Lease, and the interpretation thereof by the Court.

6. The plaintiff corporation was engaged, during the years in issue, in the drift mining of said coal, pursuant to

the Agreement of Lease, hereinabove referred to. The actual mining of the coal was done by independent contractors employed by the plaintiff corporation for this purpose. Drift mining of coal is an underground mining operation in which a horizontal coal seam is reached by clearing away part of the mountainside with a bulldozer, by a process called "facing-up" the coal seam. Two parallel tunnels are made into the coal seam, one for ventilation and the other for working space in removal of coal. The coal is removed as the drift mine is driven into the mountain following the seam of coal. The roof of the mine is supported by leaving pillars of coal in place and erecting wood supports. Under the oral agremeent, the mining contractor provided the labor and supervision necessary to mine the coal and to transport the mined coal to the tipple site for a fixed dollar amount per ton. The price per ton paid to the contractor was not dependent upon the sales price of the coal. The trucks used to haul the coal from the mine site to the tipple were furnished by the mining contractors. Plaintiff corporation furnished the majority of the mining equipment needed by the mining contractors to extract the coal, constructed and maintained the access roads and built the power lines to the mining operations.

7. When the coal has been removed from the mine, it is loaded into trucks and hauled approximately five miles to a tipple located on land owned by The Flannary Coal & Land Company, a partnership, consisting of E.M. Bane, J.W. Garside, E.B. Woodruff and John W. Garside. The tipple, located on said land, is known as the Apache Tipple and is owned by the same partners as The Flannary Coal & Land Company. The tipple consists of a preparation plant which cleans the coal prior to its sale to customers. When the coal is delivered to the tipple, by the trucks, it is weighed on a truck scale and Apache pays Black Hawk Coal Company for the coal on a per ton basis. After the coal is cleaned, it is dumped into railroad cars and then sold on the open market through a commission sales agent, the Woodruff Coal Company of Kalamazoo, Michigan.

8. The plaintiff corporation was free to sell its coal to

anyone and was not obligated to sell it to Apache Coal Company (or Flannary Coal Company) or to Kentland Coal & Coke Company, the Lessor, or its sales agency. In fact, none of said coal was sold to the Lessor or its sales agency. All of plaintiff's coal was sold to Appache (or Flannary), and the said Woodruff Coal Company of Kalamazoo, Michigan, then sold the coal on the open market to its customers. All coal feasible to mine has been extracted with mining operations ceasing in 1976.

9. All operating expenses of Black Hawk Coal Company, Inc., other than capital expenditures recoverable by depreciation, including the fees paid to the independent mining contractors, the rent or royalties paid under the agreements entitled "Agreement of Lease" and the commissions paid to sales agents were taken as deductions from gross income on the tax returns described herein as Exhibits 1, 2 and 3.

10. No claim for percentage depletion has been made by Kentland Coal & Coke Company, division of the Berwind-White Coal Mining Company, under the agreement entitled "Agreement of Lease" with Black Hawk Coal Company, Inc. No claim for percentage depletion on the coal extracted has been made by the independent mining contractors. The sole claimant to the percentage depletion deduction is the Black Hawk Coal Company, Inc.

11. Upon examination, the Commissioner of Internal Revenue disallowed the percentage depletion deduction claimed by Black Hawk Coal Company, Inc., resulting in the assessment of deficiencies in income tax against Black Hawk Coal Company, Inc.

12. Plaintiff, Black Hawk Coal Corporation, Inc., timely paid in the name of Black Hawk Coal Company, Inc., the deficiency resulting from the disallowance of depletion for the calendar years ending December 31, 1970, December 31, 1971, and December 31, 1972, in the amounts of $67,144.43, $60,344.40 and $37,199.53, respectively, which included interest as provided by law.

13. Plaintiff, Black Hawk Coal Corporation, Inc., timely

filed separate claims for refunds in the name of Black Hawk Coal Company, Inc., as follows:

Year Ended	*Amount*	*Interest*	*Total*
December 31, 1970	$54,026.98	$13,101.54	$67,128.52
December 31, 1971	$51,018.50	$ 9,310.88	$60,329.38
December 31, 1972	$32,719.89*	$ 4,059.64	$36,199.53
			163,657.43

14. The Commissioner of Internal Revenue has disallowed all claims for refund by statutory notices sent to the plaintiff dated January 7, 1976.

15. All requirements for jurisdiction of the Court have been satisfied. In the event the plaintiff is entitled to recover, the amount of recovery will be computed by the Internal Revenue Service subject to verification by the plaintiff.

16. The issue to be determined by this Court is whether the inclusion of the 30-day termination clause in the "Agreement of Lease," described in Stipulation Paragraph 3, *supra*, prevents the plaintiff from claiming the percentage depletion deduction permitted by the Internal Revenue Code.

17. This Court decided the identical issue in *Bakertown Coal Company, Inc. v. The United States*, No. 53-69, decided January 13, 1972, holding that the Lessees in that case were entitled to the percentage depletion deduction.

18. Lessor in *Bakertown*, *supra*, is the same Lessor as in the instant case. True copies of the Leases in question in *Bakertown* are attached hereto as Exhibits 6, 7 and 8.

---

* The taxpayer conceded the adjustment to interest income which increased taxpayer's taxable income in the amount of $875.00.

Respectfully submitted,

LEROY KATZ
Attorney for Plaintiff

Assistant Attorney General

Attorney for Defendant

Date

EXHIBIT 4

THIS AGREEMENT OF LEASE, made this the 20th day of February, 1964, by and between KENTLAND COAL AND COKE COMPANY DIVISION of THE BERWIND-WHITE COAL MINING COMPANY, A Pennsylvania corporation, hereinafter called LESSOR, party of the first part, and EUGENE M. BANE of Grundy, Virginia, hereinafter called LESSEE, party of the second part.

WITNESSETH:

That for and in consideration of the rents, royalties and other moneys to be paid by LESSEE unto LESSOR, as well as for and in consideration of the covenants and agreements hereinafter contained on the part of the LESSEE to be kept, performed and observed, LESSOR does hereby give and grant unto LESSEE, under and subject to all the exceptions, reservations, terms and conditions hereinafter contained and for the period of time hereinafter mentioned, the exclusive right and privilege to mine and take away the Feds Creek (Clintwood) Seam of coal upon and underlying certain tracts or boundaries of land situate as follows, to-wit:

Part of Kentland Tract	464	Matilda J. Fuller	Mineral	11.94 A
Part of Kentland Tract	467	Elijah Fuller	Mineral	13.31 "
Part of Kentland Tract	468	Matilda J. Estep	Mineral	9.18 "
Part of Kentland Tract	472	Thornsbury & Jones	Mineral	27.78 "
Part of Kentland Tract	501	George W. Dotson	Mineral	41.55 "

Part of Kentland Tract	529	David Griffey, Sr.	Mineral	37.88"
Part of Kentland Tract	530	James Griffey	Mineral	37.65"

being those parts of tracts lying on the point ridge between Road Fork and Dicks Fork of Feds Creek and Hen Roost Fork of said Dicks Fork, said Feds Creek being a tributary of Levisa Fork of Big Sandy River, in Pike County, Kentucky, said leased area being colored red as to mineral and outlined in green on whiteprint map attached hereto and made a part hereof, bearing the following title and legend:

KENTLAND COAL AND COKE COMPANY
DIVISION OF THE BERWIND-WHITE COAL
MINING COMPANY
PIKE COUNTY, KENTUCKY

February 10, 1964 Scale 1" = 1000'

LEGEND

Mineral—Area of Feds Creek (Clintwood) Seam of Coal
Proposed To Be Leased To Eugene M. Bane

LESSEE agrees to have the outcrop of said Feds Creek (or Clintwood) seam, also all property lines above the outcrop of said seam, accurately, surveyed within six months from date hereof, and shall furnish to LESSOR prints, on a scale of one inch equals one hundred feet, showing the results of said surveying, by accurate bearings and distances. LESSEE'S engineers shall consult with LESSOR'S engineers as to proper location of the outcropping of said Feds Creek (or Clintwood) seam, property lines and permanent points to be established.

TOGETHER WITH THE RIGHT to mine and remove the said coal in accordance with the mining rights vested in the LESSOR, it being distinctly understood and agreed that the LESSOR grants only such mining rights and privileges as it possesses or has acquired in conjunction with the ownership of the coal covered by this agreement; and that in mining, removing and carrying away said coal the LESSEE shall be limited to the exercise of the aforesaid rights and privileges, and shall protect and save harmless the LESSOR from any liability or any claims for damages to roads, railroads, wire or pipe lines, person, or

persons and/or property, except property owned by the LESSOR within the leased premises, caused by its operations hereunder. LESSOR agrees to so operate the seam hereby leased that overlying seams will not be injured or destroyed.

NOTHING HEREIN CONTAINED shall be deemed or construed to be a covenant on the part of the LESSOR, either expressed or implied, for title or for quiet enjoyment; but the LESSEE must respect and observe all limitations or defects in the title of the LESSOR in and to said land and the coal rights. It is likewise understood by the LESSEE that the LESSOR gives no warranty as the the quality or quantity of the coal contained in the leased premises and assumes no liability due to any deficiency which may exist or develop therein.

IN THE EVENT ANY PART of the said leased premises is lost to the holder of an outstanding superior title, if the LESSEE has mined and removed a part or all of the coal therefrom and paid the LESSOR therefor on the royalty basis, the LESSOR agrees to repay to the LESSEE the amount of royalty so paid, without interest, but the LESSOR shall not be otherwise liable for any damage on account of the mining and removing of said coal by the LESSEE, and the LESSEE shall protect and save harmless the LESSOR from all suits, actions damages or claims whatsoever, resulting or arising therefrom.

THE RIGHTS GRANTED THE LESSEE herein shall in all respects be inferior and subject to the rights granted by the LESSOR herein unto United Fuel Gas Company, by lease to Howe Oil and Gas Company, and passing by assignment to it, dated July 24, 1930, recorded in Deed Book 163, at page 84, Pike County Court Clerk's Office, which lease is referred to for more particular description of the rights therein granted and to which this lease is subject, but all rights and privileges respecting the mining of coal reserved in said lease to United Fuel Gas Company shall inure to the benefit of LESSEE, and, without limiting the generality of the foregoing, LESSEE shall

promptly transmit to LESSEE all information it has, or may receive, of prospective oil and gas drilling.

THE RIGHTS GRANTED THE LESSEE herein are also expressly made subject to the rights granted unto Stelco Coal Company by LESSOR by Agreement of Lease dated May 1, 1962, not recorded, granting the right to mine the Freeburn, or Lower Elkhorn, seam of coal overlying the area hereby leased, copy of said lease is furnished the LESSEE herein.

There is excepted and reserved from the area described herein the following tract:

Virginia Iron Coal and Coke Company Tract No. 468-A are as shown on above-mentioned whiteprint map on Orchard Hollow of Feds Creek, containing 0.32 ac., more or less.

IT IS UNDERSTOOD that the LESSEE shall not be required to mine coal where the thickness of the seam is under thirty-six (36) inches, including normal partings, but may do so; however, LESSEE must thoroughly prospect thin areas and if coal thirty-six (36) inches and over in thickness is found, LESSEE shall drive through or around thin areas and recover the thicker coal. If LESSEE mines coal from areas under thirty-six (36) inches, he must also remove coal pillars where he has mined the coal in the rooms.

THE LESSOR, ITS SUCCESSORS AND ASSIGNS, shall have the right at all times to mine, bore, search for, develop and market all other seams of coal in said land, and the oil, gas, minerals and other substances therein and thereon, and the right to use such of the leased premises as may be reasonably required for the purposes aforesaid, or any of them; also the right to lay in, on or under said land any and all pipe lines for conveying oil, gas, water or other substances from other tracts of land, as well as the right to construct telegraph, telephone and power lines, but such right shall be exercised in such a way as to interfere as little as possible with the mining operations of the LESSEE hereunder, all of which rights mentioned in

this paragrap are hereby expressly reserved to the LESSOR, its successors and assigns.

TO HAVE AND TO HOLD the hereinbefore described rights and privileges, excepting and reserving as aforesaid, unto the said LESSEE, during the term commencing on the first day of March, 1964, and terminating when LESSEE shall have exhausted all of The Feds Creek (or Clintwood) Seam of coal, subject to the exceptions herein set out, or until said tenancy shall be earlier terminated as thereinafter provided.

IN CONSIDERATION WHEREOF, THE LESSEE, FOR HIMSELF, HIS SUCCESSORS AND ASSIGNS, DOES HEREBY COVENANT, PROMISE AND AGREE TO AND WITH THE LESSOR, ITS SUCCESSORS AND ASSIGNS, AS FOLLOWS:

RENTAL

1st. The LESSEE shall pay to LESSOR, as rental, the Minimum sum of FIVE THOUSAND DOLLARS ($5,000) per year, payable monthly in advance, without regard to the quantity of coal mined, which sum shall be payable, without demand therefor, on or before the first (1st) day of each and every calendar month.

ROYALTIES

2nd. LESSEE shall pay unto LESSOR as tonnage royalty the sum of twenty-five cents (25¢) for each and every net ton of two thousand (2,000) pounds of coal mined from the leased premises, or lost or left in mining, in the manner following:

The royalty on all coal mined during each calendar month of the term hereof shall be paid on or before the 20th day of the succeeding month, and the LESSEE shall receive credit on every royalty payment due by the amount of the monthly installment of the annual rental paid for the month in which said tonnage was mined. If the amount of royalty which becomes due in any month of the term hereof does not exceed the rental paid for the month,

then the payment of said rental shall be a full and complete satisfaction of the said royalty. If the royalty aforesaid exceeds the rental paid for such month, then only such excess shall be paid in addition to the rental for that month; provided, however, that the LESSEE shall not be required to make any payments on account of any excess until all deficit, which might accrue under the provisions of ARTICLE 3rd hereof shall have been worked out.

CREDIT

3rd. The accounts of the LESSEE shall be so adjusted that if the quantity of coal which the LESSEE mines from the leased premises in any month of the term hereof is less than the quantity of coal required, calculated at the royalty rate provided herein, to produce a sum equal to the rental paid for such month, the LESSEE shall have the right to mine and remove in any future month or months of the term hereof, and without further royalty payment therefor, an amount of coal equal to such deficit in quantity, but only after sufficient tonnage, to pay the rental for the current month, shall have been mined.

It is always understood that whenever the total payments from all sources of either tonnage royalties or rentals, or for coal lost, shall amount to a sum of money which equals said tonnage royalty of twenty-five cents (25¢) on all of the coal now in the Feds Creek (or Clintwood) Seam in the leased premises which LESSEE is required to mine hereunder including all coal lost in mining and all coal remaining in pillars and supports, which may result from the LESSEE's mining operations, and also including coal in said seam under thirty-six inches in thickness which the LESSEE has actually mined and paid for, the LESSEE shall not thereafter be required to pay any further tonnage royalty or rental, but may continue to hold the leased premises without further payment of tonnage royalty or rental until the expiration of the term of this lease or sooner determination thereof. Howver, the burden shall be upon the LESSEE to develop and prove the total tonnage contained in said seam and the LESSEE shall never

have the right to recover from the LESSOR any payment of tonnage royalties or rentals on the ground that the total thereof is in excess of said tonnage royalty on all of the coal in said seam.

WEIGHTS

4th. The quantity of coal on which LESSEE pays royalty shall be determined by railroad weights of the railroad over which said coal is shipped, except such coal as may be otherwise disposed of, which shall be estimated by measurement of the bed of trucks on which same is delivered. A complete record and account of all coal mined by the LESSEE hereunder shall be kept at all times and shall be open to the inspection of LESSOR or its representatives. Coal delivered to the railroad and coal sold otherwise shall be reported separately.

TAXES

5th. LESSEE shall pay all taxes levied upon the entire estate of the LESSOR in the real estate covered hereby and upon all coal mined and produced therefrom, and also upon LESSEE's plant, equipment and improvements located upon the leased premises. If any payment of either of said taxes shall be made by LESSOR, the same shall be repaid by LESSEE upon statement and demand.

PLACE OF PAYMENT

6th. All rents, royalties or other moneys becoming due and payable by the LESSEE to the LESSOR under the terms hereof shall be paid promptly by the LESSEE unto the Treasurer of the LESSOR at its office, 600 two Penn Center Plaza, Philadelphia 2, Pennsylvania, at the times herein specified, without previous demand for the same, which manner and place of payment are hereby designated as the manner and place of all payments to be made by the LESSEE unto the LESSOR until such times as the LESSOR may, by written notice to the LESSEE, otherwise appoint or direct, and all payments shall be treated as rents reserved for the use of said premises.

NON-PAYMENT OF RENT—FORFEITURE

7th. In the event of the failure on the part of the LESSEE to make payment of rent, royalty and other moneys, or taxes, within the period of sixty (60) days next after the times herein fixed for such payments, the LESSOR may, at its option, terminate this agreement and declare the rights and privileges herein granted to be forfeited whereupon the said rights and privileges shall cease and determine, and this agreement shall become null and void and of no further effect, and the LESSOR may thereupon repossess itself of the premises, either by action of ejectment or by act of re-entry, using whatever force may be necessary, without any liability for damages for so doing.

RECORDS AND REPORTS

8th. LESSEE shall furnish unto LESSOR on or before the fifteenth (15th) day of each month a complete, correct and itemized settlement, in triplicate, on a form or forms furnished by LESSOR, showing for the preceding calendar month the number of tons of coal mined from the leased premises and any other information required by LESSOR. LESSEE shall keep and preserve full and complete records of all coal mined from the leased premises, which shall be open to the inspection of LESSOR at all times.

OPERATION

9th. LESSEE shall start operations within thirty (30) days from the date hereof, and shall conduct his operations in a careful and skillful manner and in accordance with any and all laws of the State of Kentucky, and of the United States of America, he shall not dump overburden, slate or mine refuse upon the mine property or adjoining land except at point or points to be designated in writing by the LESSOR.

LESSEE shall conduct his operations in a proper and skillful manner under the direction of a competent mining engineer and in compliance in every respect with the laws of the State of Kentucky and of the United States which

are now in force or which maybe hereafter enacted, and shall employ only the best and most improved methods of mining the coal to the end that the greatest possible amount of coal may be recovered. The mine shall be kept in good working order and condition, and no coal shall be left that might have been mined. The workings shall be left free from accumulation of water, and in such condition that the remaining coat may be recovered.

The operation of the Feds Creek (Clintwood) Seam of coal leased herein shall be conducted in such a manner as not to interfere with, injure or destroy the overlying Lower Elkhorn Seam of coal, now under lease to Stelco Coal Company. LESSEE agrees to locate and establish by proper engineering procedures, the outcrop of the said lower Elkhorn Seam of coal underlying the premises leased herein and to show the results of said location in relation to his workings in the Feds Creek Seam of coal leased herein, on his maps as hereinafter required.

LESSEE shall develop the Feds Creek Seam of coal leased herein underlying the aforementioned Lower Elkhorn Seam of coal now under lease to Stelco Coal Company in accordance with plans of mining and descriptions thereof which shall be prepared by LESSEE and submitted to LESSOR for his approval, and put in operation only upon approval in writing by said LESSOR. No change in any plan so approved shall be made in the development or operation of the said Feds Creek Seam of coal leased herein except as requested in writing by LESSEE and approved in writing by LESSOR, or as required in writing by LESSOR, such request or requirement to be accompanied by plans illustrating such change.

LESSEE shall give LESSOR prompt notice in writing of any coal which may be lost in mining under this lease, and should any coal be lost through negligent, careless or improper mining by LESSEE, LESSEE shall pay for the same as if mined and removed and at the times herein fixed for the payment of royalty on coal mined and removed; provided, however, that barrier pillars required by law and pillars left standing for the support of surface

improvements or for the support and protection of the overlying Lower Elkhorn Seam of coal, upon the requirement of LESSOR as above set forth, shall not be deemed lost coal.

SURVEYS AND MAPS

10th. LESSEE shall have a survey of the mine workings made by a competent mining engineer promptly as the work progresses, said survey to be based upon LESSOR's meridian and coordinate values on its base line from the mouth of Dicks Fork of Feds Creek, up said Fork of Feds Creek and up to Hylton Triangulation Station, said meridian and coordinate values to be furnished to LESSEE by LESSOR prior to the beginning of said survey, and LESSEE shall keep an accurate and complete map of the leased premises and mine workings, (on a scale of one hundred feet (100') to the inch, which map shall conform in all respect with the requirements of the bituminous mining laws of the State of Kentucky and the United States, as now in force or which may be hereafter enacted, and shall show all property lines, surface improvements and such natural topography as may require protection against liability for damages to persons or property, or by flooding in the operation hereunder. Such map shall at all times be accessible to the LESSOR, its agents or representatives, for inspection and a true, complete and correct copy of the same, posted to January 1, April 1, July 1, and October 1, of each year, shall be furnished in triplicate to the LESSOR, without demand, within ten days after the above-mentioned dates. All rooms and entries, except those following a water drainage course, shall be driven on transit survey sights, and no ribs or pillars shall be drawn until a survey of the place driven to its destination has been made. Accurate measurements at divers places of the thickness and elevation of the seam of coal, as the same is mined, the location of faults, clay veins, rolls and areas of bad roof shall be shown on the mine maps.

LESSEE shall furnish to LESSOR on or before the twentieth (20th) day of January of each year of the term

hereof, and as such other times as may be fixed by law or required for tax assessments, a statement showing the acreage of the herein leased seam of coal mined, abandoned, lost and remaining, separated as to tracts.

INSPECTION

11th. LESSOR, its agents, engineers or other persons in its behalf, with their assistants, shall have the right to enter at all times the said mines or works of LESSEE, in order to inspect, examine, select samples of coal, survey or measure the same or any part thereof, for the purpose of ascertaining the condition of the mine, the methods practiced, as well as the amount of coal removed, or for any other lawful purpose, and LESSOR shall have the right to place and keep an inspector or other representative upon the tipple and in the mine of LESSEE, for the purpose of checking the weights, measures, accounts and methods of LESSEE, and for these purposes to use freely the means of access to the said mines and works without let, hindrance, or molestation. LESSOR alone shall be responsible for any injury to any agents, engineers or other persons in its behalf who may enter said mines or works of LESSEE, unless such injury is caused by the negligence of LESSEE or his employees.

DAMAGES

12th. LESSEE shall so conduct his mining operations as not to violate any rights of lateral and subjacent support belonging to the owners of other estates, and shall assist the LESSOR in the defense of any action instituted for the recovery of any damages, resulting from his operations hereunder or prior to execution of this agreement, to the overlying strata or to the surface overlying the Feds Creek or Clintwood Seam of coal leased hereby, or to any buildings or other structures thereon erected, or to any springs, waterways or watercourses thereon or thereunder, or to any other estate so situated as to be in any manner affected. LESSEE shall notify LESSOR at once of any action instituted against LESSEE for the recovery of

damages aforesaid, so that a proper defense against such suit may be arranged for and agreed upon. LESSEE alone shall be responsible for any injury to any person or property, caused by the mining, handling or preparation of coal produced hereunder, and for any mining outside the leased premises, and shall save LESSOR harmless from all suits, actions, loss and/or damages resulting therefrom.

ASSIGNMENTS

13th. LESSEE shall not assign, or subject in whole or in part, this agreement or the estate created hereby or any interest therein, or part with the possession of said premises or any part thereof without first obtaining the consent in writing of LESSOR thereto, but nothing herein shall be construed to prevent LESSEE from subletting any part of the leased premises for tenements, minders' houses, stores, schools, churches or other facilities incidental to the mining of the leased coal or necessary to the providing of adequate mining community for the purposes hereof.

INSOLVENCY, BANKRUPTCY, ETC.

14th. LESSEE shall not permit this agreement or the estate hereby created or any interest therein to be levied upon or sold under any execution or other legal proceeding or process whatsoever. The assignment or transfer of this agreement or the estate and rights created or any of them under judicial process or under judgment or decree or adjudication of LESSEE as a bankrupt, or the discharge of LESSEE by any court as an insolvent debtor, or the assignment or subletting by him of any interest in this agreement, or the parting with the possession of the premises or any part thereof, without the written consent of LESSOR as above provided for, may, at the option of LESSOR, be considered and held as an absolute forfeiture of this agreement, and thereupon, all the rights of LESSEE hereunder shall at once cease and determine, and LESSOR, in addition to all of its other legal rights and remedies, may, at its option, at once resume possession of the premises and all the improvements hereinbefore men-

tioned, either by legal process or by summary proceedings without legal process.

CANCELLATION

15th. This agreement of lease may be cancelled by either party hereto at any time by either party giving to the other thirty (30) days written notice of its or his intention to cancel same. Said notices shall be sufficient if given by registered letter postmarked in the United States mails, and thirty (30) days after receipt of such letter said agreement of lease shall stand cancelled and terminated, and shall be of no further force and effect.

REMEDIES

All of the foregoing powers of reentry, and all other provisions for enforcement of the rights of LESSOR are remedies cumulative to one another and to all other remedies, suits, actions and proceedings at law or in equity, that LESSOR may choose to exercise and for the purpose of enforcing the payment of any rent or royalty the said LESSOR shall not only have all rights and remedies provided at any time by the laws of the State of Kentucky for landlords, but a lien is hereby created and imposed upon this lease and the leasehold estate hereby created with all the rights and privilegs conferred upon LESSEE hereunder, together with all the improvements placed by LESSEE upon the leased premises, to secure the payment of all rent, royalty or other moneys of every kind and character accruing or becoming due at any time under this lease.

MODIFICATION AND ALTERATION

17th. NO MODIFICATION, ALTERATION, WAIVER, OR ADDITION to this agreement or any part thereof shall be valid or binding or be set up or relied upon by either party unless the same be in writing and signed by LESSOR and LESSEE. No evidence of any such modification, alteration, waiver or addition shall be received in

any controversy arising out of this agreement, except it be in writing and signed as aforesaid.

WAIVER

18th. NEGLECT OR REFUSAL OF LESSOR at any time to avail itself of any of its rights or remedies hereunder shall not be construed as a waiver of its right and privilege to avail itself of each and every of such rights and remedies whenever and as often as any new ground therefor may arise.

CONDITIONS

19th. THE TERMS, PROVISIONS, COVENANTS AND STIPULATIONS herein contained shall be taken and deemed as conditions for the breach of which the term hereof may be forfeited.

IN TESTIMONY WHEREOF, LESSOR has caused its name to be signed and its seal to be affixed hereunto by its proper officers, thereunto duly authorized, and LESSEE has subscribed his name hereunto, this the day and date first hereinbefore written.

EXECUTED IN DUPLICATE

KENTLAND COAL AND COKE COMPANY
DIVISION OF THE BERWIND-WHITE COAL MINING COMPANY

ATTEST:

_____ By _____

Secretary President

_____

Eugene H. Bane

WITNESSES:

_____

_____

RELEVANT DOCKET ENTRIES

BULL RUN MINING CO., INC.,
A WEST VIRGINIA CORPORATION

v.

THE UNITED STATES

Jul 27 1977	Filing fee of $10 paid by plaintiff.
Aug 16 1977	Notice of reference to Trial Judge Roald A. Hogenson filed. Copy to parties. vacated 11/8/77
Sep 26 1977	Defendant's answer filed. Copies (5) to atty.
Sep 28 1977	Trial judge's standard pretrial order on liability filed. Copy to parties.
Nov 8 1977	Notice of reassignment of case to Trial Judge Judith Ann Yannello filed. Copy to parties.
Dec 7 1977	Defendant's motion for extension of time (to February 5, 1978) to comply with pretrial order filed. Copies (2) to atty. ALLOWED DEC 8 1977.
Feb 3 1978	Defendant's motion for extension of time (to April 6, 1978) to comply with pretrial order filed. Copies (2) to atty. ALLOWED FEB 6 1978.
Apr 6 1978	Defendant's motion for extension of time (to June 5, 1978) to comply with pretrial order filed. Copies (2) to atty. ALLOWED APR 7 1978 with no further extension to be granted except for extraordinary circumstances.
Jun 15 1978	Trial judge's order pursuant to Rule 114 filed. Copy to parties.
Sep 15 1978	Plaintiff's motion for summary judgment filed. Copies (5) to deft.
Sep 15 1978	Plaintiff's motion for waiver of attaching copy of depositions to dipositive motion for

summary judgment filed. Copies (2) to deft. ALLOWED SEP 29 1978.

Oct 16 1978 Defendant's motion for extension of time (to Nov. 14, 1978) to file its response to plaintiff's motion for summary judgment filed. Copies (2) to atty. ALLOWED November 1, 1978.

Nov 14 1978 Defendant's motion for extension of time (to Dec. 14, 1978) to file its response to plaintiff's motion for summary judgment filed. Copies (2) to atty. ALLOWED: DEC 7 1978, to the extent that defendant is granted an extension of time to Monday, December 11, 1978.

Nov 22 1978 Plaintiff's objections to defendant's motion for enlargement of time to file response to plaintiff's motion for summary judgment filed. Copies (2) to deft.

Dec 11 1978 Defendant's cross-motion for summary judgment and brief, etc., filed. Copies (5) to atty.

Jan 15 1979 Plaintiff's reply to defendant's cross-motion for summary judgment, etc., filed. Copies (5) to deft.

Feb 5 1979 Defendant's reply brief in support of its cross-motion for summary judgment and in opposition to plaintiff's motion for summary judgment filed. Copies (5) to atty.

May 15 1979 Defendant's motion for order directing consolidation [in this, 49–77 and 403–75], and establishing schedule for oral argument filed. Copy to attys. ALLOWED MAY 24 1979 SEE ENTRY THIS DATE.

May 21 1979 Plaintiff's motion in opposition to defendant's motion for establishing schedule for oral argument filed. [in this, 49–77, and 403–75]. Copies (2) to deft., and to atty in 49–77 and 403–75.

May 24 1979	Re: defendant's motion, filed May 15, 1979. ALLOWED as to consolidation with the three plaintiffs' attorneys to argue first and granted 45 minutes to be divided as they may agree on or 15 minutes each, with defendant to argue thereafter for 45 minutes and with the court to determine at the time of oral argument how much, if any time, is to be allowed to plaintiff for rebuttal.
Jun 4 1979	In this, 403–75 and 49–77. Case No. 400–77 argued and submitted on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, Case Nos. 403–75 and 49–77 argued and submitted on the merits [before, Davis, Kashiwa and Bennett].
Jul 18 1979	See 403–75 for Court Opinion.
Aug 8 1979	Trial Judge's Order pursuant to Rule 111 filed. Copy to parties.
Nov 21 1979	Stipulation and entry of judgment filed by defendant. Copies (2) to atty.
Nov 28 1979	Trial Judge's memorandum report for judgment filed. Copy to parties.
Dec 7 1979	Court filed order entering judgment for plaintiff in the sum of $20,960.43., plus statutory interest.
Dec 7 1979	Certified transcript of judgment mailed to attorney of record.

In the United States Court of Claims

No. 400–77

BULL RUN MINING CO., INC.,
A WEST VIRGINIA CORPORATION,

v.

UNITED STATES OF AMERICA, DEFENDANT

PETITION

TO THE HONORABLE THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE COURT OF CLAIMS:

1. Plaintiff, Bull Run Mining Co., Inc., is a corporation chartered under the laws of the State of West Virginia, on or about the 7th day of September, 1965, with its principal office located at Masontown, West Virginia. Said corporation was authorized to issue 100 shares of common stock with the par value of $100.00. Ten (10) shares were issued and outstanding during the fiscal year ending September 30, 1974. The following is a list of the shareholders and the number of shares owned by each at that time:

Carlton L. McKenney, Sr.	8
Mary McKinney	1
Carlton L. McKinney, Jr.	1
Total	10

Said corporation filed its income tax return for the fiscal year ending September 30, 1974, with the Internal Revenue Service Center, 3131 Democrat Road, Memphis, Tennessee, 38110, and paid the tax shown thereon to be owing in the amount of $8,216.49.

2. This action is brought pursuant to Section 1346 and 1491 of the Judicial Code (28 U.S.C.A. Sections 1346 and 1491) against the United States of America, as Defendant.

3. During the fiscal year ending September 30, 1974, Plaintiff, Bull Run Mining Co., Inc., was engaged in the business of mining and producing coal. Said company op-

erated under written agreement of lease dated the 21st day of June, 1967, between Preston County Coal and Coke Corporation, a corporation, Lessor, and Bull Run Mining Co., Inc., a corporation, Lessee. A copy of said lease, identified as Exhibit A is attached hereto and by reference is made a part hereof.

4. Said written lease granted to Bull Run Mining Co., Inc., Lessee, the exclusive right to mine and remove maximum amount of coal consistent with modern mining methods and in accordance with all existing rules, regulations and laws affecting deep mining of coal now in effect or which may hereinafter be placed in effect by the State of West Virginia or the United States subject to the terms of said lease, under certain tracts of land situate in Valley District, Preston County, West Virginia, known as Tracts 125 D and 126 D, as originally designated upon maps of the Bethlehem Mines Corporation, as more specifically set forth in said lease.

5. In consideration thereof, the Lessee agreed to pay to the Lessor the sum of 25¢ per ton for all coal mined and removed from the premises and which payment would be made on or before the 25th day of each calendar month for all coal mined and removed during the preceding calendar month. The lease does not require that the mined coal be sold or delivered to the Lessor, but the Lessee is authorized to extract and dispose of the coal underlying the leased premises to whomever and at what prices it chooses, without any restrictions.

6. Bull Run Mining Co., Inc., from the date of the above mentioned lease, to September 30, 1974, had made a substantial investment in the opening of the mine, construction of buildings, acquisition of mining equipment, vehicles and supplies in the amount of $167,385.54.

7. Bull Run Mining Co., Inc., must look to the proceeds from its sale of the coal as the sole source of the revenue from which it could recover the rents and royalties it paid for the privilege of mining and its investment in the lease, including the machinery, equipment and supplies, purchased to mine the coal.

8. As a result of the lease agreement with Preston County Coal & Coke Corporation, a corporation, hereinabove referred to, and its substantial investment in the opening and operating of said mine, the said Bull Run Mining Co., Inc., a corporation, acquired an economic interest in the coal which it produced under said lease agreement and was entitled to percentage depletion under Sections 611 and 613 of the Internal Revenue Code of 1954.

9. No claim for percentage depletion on the coal extracted has been claimed or deducted by the Lessor. The sole claimant to said percentage depletion deduction was the Bull Run Mining Co., Inc., a corporation.

10. Upon examination, the Commissioner of Internal Revenue, erroneously disallowed the depletion deduction claimed by the Plaintiff, Bull Run Mining Co., Inc., resulting in the assessment of deficiencies in income tax against the said Bull Run Mining Co., Inc., a corporation.

11. On or about the 5th day of May, 1976, Plaintiff, Bull Run Mining Co., Inc., paid the deficiency resulting from the disallowance of the depletion for a fiscal year ending September 30, 1974, as provided by law, in the amount of $34,031.99. The interest and penalty notice in the amount of $3,137.62 was paid on or about the 22nd day of April, 1976.

12. On or about June 25, 1976, Plaintiff, Bull Run Mining Co., Inc., filed a 1120X, Claim for Refund, for the fiscal year ending September 30, 1974, with the Internal Revenue Service Center, 3131 Democrat Road, Memphis Tennessee, for the amount of $21,591.08, plus interest. A copy of said 1120X identified as Exhibit B is attached hereto and made a part hereof. This claim was based on the fact that Bull Run Mining Co., Inc., was entitled to $5,000.00 deduction for the rental of equipment that the agent erroneously disallowed in his report, and was entitled to the depletion claim in the amount of $39,981.41 which it was entitled to for the fiscal year ending September 30, 1974.

13. The Commissioner, on re-examination of the records of Bull Run Mining Co., Inc., and by his report dated February 16, 1977, allowed the $5,000.00 deduction for rent expense but refused to allow the deduction for depletion as claimed by the Bull Run Mining Co., Inc., in the amount of $39,981.41. A copy of said Commissioner's Report identified as Exhibit C is hereby attached and made a part hereof.

14. By reason of the Commissioner's failure to allow the claim for refund of the Plaintiff for the deduction for depletion as set forth above for the year ending September 30, 1974, plus interest, are now wrongfully withheld from the Plaintiff without its consent and against its will, in the amount of $18,257.40.

15. The amount claimed represents the additional income taxes paid by the Plaintiff to the Internal Revenue Service Center located at 3131 Democrat Road, Memphis, Tennessee, 38110, as a result of the disallowance of the claimed percentage depletion to the Bull Run Mining Co., Inc., for the fiscal year ending September 30, 1974.

16. No action has been had on said claim in the United States Congress, or any of the departments of government, or in any other judicial proceeding, including in the Tax Court of the United States; no other persons, firms or corporations, other than the Plaintiff, are the owners thereof or interested therein; no assignment or transfer of this claim or any part thereof, or interest therein, has been made; Plaintiff is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The Plaintiff has, at all times, born true faith in the allegence of the government of the United States and has not, in any way, voluntarily aided, abedded or given encouragement against the said government.

WHEREFORE, Plaintiff, Bull Run Mining Co., Inc., asks judgment against the United States of America in the sum of $18,257.40, together with costs and interest to the ex-

tent allowed by law, and for such other and further relief as may to this Honorable Court, seem just and proper.

BULL RUN MINING CO., INC.,
A WEST VIRGINIA CORPORATION, *Plaintiff*
By Counsel

WOODROW A. POTESTA,
Attorney at Law,
Suite 607 Deveny Building,
Fairmont, WV 26554.
Counsel for Plaintiff.

EXHIBIT A

THIS LEASE AND AGREEMENT, made this 21st day of June 1967, between PRESTON COUNTY COAL AND COKE CORP, a corporation, party of the first part, the LESSOR, and BULL RUN MINING COMPANY, a corporation, party of the second part, the LESSEE;

WITNESSETH: That for and in consideration of the sum of ONE DOLLAR ($1.00), cash in hand paid, receipt of which is hereby acknowledged, and of the further rents and royalties to be paid by the Lessee to the Lessor, and the further covenants and conditions to be kept and performed by Lessee, the said Lessor does hereby let and lease unto the said Lessee, all of the unmined coal of the Upper Freeport vein, situate on and under those certain tracts of land situate in Valley District, Preston County, West Virginia, known as Tracts 125D and 126D, and as originally designated upon maps of the Bethlehem Mines Corporation, and which tracts were conveyed to the Lessor herein by Shay-Boyle Land Company, a corporation, by deed dated April 1, 1950, and of record in the office of the Clerk of the County Court of Preston County, West Virginia, in Deed Book 278, page 217, excepting, however, a 10 acre reservation of said Tract 126D, said tracts and said reservation being shown on a map, a copy of which is in the possession of both parties hereto, all upon the following terms and conditions:

1. *MINING RIGHTS*. Lessee shall have and is hereby given the right to mine and remove coal from the tracts herein leased by the deep mining method, using all of the deep mining rights therewith as are owned by the Lessor, and which deep mining rights are hereby let and leased, together with said coal, and the right to use and exercise said deep mining rights as fully and completely as if the same were set out verbatim herein, but further provided that the Lessor leases no greater mining rights with said coal than it may own.

Lessee shall mine and remove said coal in a good workmanlike manner so as to mine and remove a maximum amount thereof consistent with modern mining methods and in accordance with all existing rules, regulations and laws affecting the deep mining of coal now in effect or which may hereinafter be placed in effect by the State of West Virginia or the United States.

2. *TERM*. The term of this lease shall be for a period of five (5) years from the date first hereinabove set forth or sooner if all of the coal is mined and removed from the demised premises which can be mined and removed by the use of modern mining methods. If all of said coal is not so removed at the end of the original term hereof, the Lessee may renew this lease for an additional term of five (5) years upon giving to Lessor written notice of its intention to renew, which notice shall be sent by mail to the Lessor at Cascade, West Virginia, prior to the expiration of the original term hereof.

3. *ROYALTY*. Lessee shall pay unto the said Lessor, the sum of TWENTY-FIVE CENTS ($.25) per ton for all coal mined and removed from the demised premises, and which payment shall be made on or before the 25th day of each calendar month for all coal mined and removed during the preceding calendar month, and shall be accompanied by a statement showing the total number of tons of coal mined. The books and records of Lessee, as well as inspection of the mine or mines, shall be reserved to the Lessor at all reasonable times in order to verify the accuracy of the weights of the coal mined and removed.

4. *LESSEE'S DUTIES.* Lessee, in addition to mining and removing the coal by modern mining methods, shall comply with all existing workmen's compensation laws, and shall operate siad coal as an independent lessee and in no other legal capacity as far as the Lessor is concerned, and shall save Lessor harmless of and from any and all liability arising out of or resulting from the mining of said coal, the transportation of same to market, and any other act or thing arising out of Lessee's operations. Lessee shall further carry and keep in effect, a public liability insurance policy in an amount of at least ONE HUNDRED THOUSAND DOLLARS ($100,000.00), to cover personal injuries or property damage.

5. *CANCELLATION.* It is agreed between the parties that either party to this agreement may cancel this lease upon giving to the other party a written notice at least thirty (30) days prior to the effective date of said cancellation. If any coal is mined during said thirty (30) day period, the same shall be paid for the same as if said notice were not given, and upon the expiration of said thirty (30) days, Lessee agrees to deliver the possession of said premises to the Lessor. Upon such cancellation becoming effective, Lessor shall reasonably compensate Lessee for the then fair market value of track, conveyors, dumps, bins, motors and other equipment which Lessee shall have affixed to the premises, and if the parties cannot agree upon such compensation, Lessee shall have a period of four (4) months within which to remove his equipment, from the effective date of cancellation.

6. *ASSIGNMENT.* This lease, nor any part hereof, nor any portion of the demised premises, may be assigned or sublet by the Lessee to any other person, firm, or corporation, without the express prior written consent of the Lessor.

7. *LANDLORD'S LIEN.* The Lessor herein reserves all of the rights reserved to a landlord under the laws of the State of West Virginia, for the payment of all of the rents and royalties to become due under the terms hereof, and any waiver of such rights by the Lessor shall not be con-

strued as a waiver of any subsequent breach or failure to make payments required hereunder on the party of the Lessee herein.

WITNESS the following signatures and seals:

PRESTON COUNTY COAL AND COKE CORP.,
A CORPORATION.

BY: _____ (SEAL)

ITS: _____

LESSOR.

BULL RUN MINING COMPANY,
A CORPORATION.

BY: _____ (SEAL)

ITS: _____

LESSEE.

STATE OF WEST VIRGINIA,
COUNTY OF PRESTON, TO-WIT:

I, HOWARD D. BURGE, a Notary Public in and for said County and State, hereby certify that PAUL S. LINSLEY, whose name is signed to the foregoing writing bearing date the 21st day of June, 1967, for Preston County Coal and Coke Corp., a corporation, has this day, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 6th day of July, 1967.

My Commission expires June 21, 1968.

/s/ _____
Notary Public

STATE OF WEST VIRGINIA,
COUNTY OF PRESTON, TO-WIT:

I, HOWARD D. BURGE, a Notary Public in and for said County and State, hereby certify that C. L. MCKINNEY,

whose name is signed to the foregoing writing bearing date the 21st day of June, 1967, for Bull Run Mining Company, a corporation, has this day, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 6th day of July, 1967.

My Commission expires June 21, 1968.

/s/ _____

Notary Public

THIS INSTRUMENT WAS PREPARED BY CHARLES V. WEHNER, ATTORNEY AT LAW, KINGWOOD, WEST VIRGINIA.

In the United States Court of Claims

No. 400–77

BULL RUN MINING CO., INC.,

Plaintiff

v.

THE UNITED STATES,

Defendant

ANSWER

Sep 26 1977

Defendant, the United States, in answer to the petition in the above-captioned case, respectfully denies each and every allegation therein not admitted, qualified, or expressly referred to below.

Defendant further:

1. Admits the allegations contained in paragraph 1.

2. Admits that proper jurisdiction, if it exists, is conferred upon this Court by 28 U.S.C. Section 1491.

3. Admits the allegations contained in paragraph 3.

4. Admits that said written lease recites that Bull Run Mining Co., Inc., lessee, was granted the right to mine and remove coal consistent with modern mining methods and in accordance with all existing rules, regulations, and laws affecting deep mining of coal now in effect or which may hereinafter be placed in effect by the State of West Virginia or the United States subject to the terms of said lease, under certain tracts of land situate in Valley District, Preston County, West Virginia, known as Tracts

125D and 126D, as originally designated upon map of the Bethlehem Mines Corporation, as more specifically set forth in the lease.

5. Admits the allegations contained in the first sentence of paragraph 5. Avers that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of paragraph 5.

6–7. Avers that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 and 7.

8. Denies the allegations contained in paragraph 8.

9. Avers that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9.

10. Admits that upon examination the Commissioner of the Internal Revenue Service disallowed the depletion deductions claimed by the plaintiff resulting in an assessment of deficiencies in income tax. Denies the allegations that the said disallowance was erroneous.

11–13. Admits the allegations contained in paragraphs 11 through 13.

14–15. Denies the allegations contained in paragraphs 14 and 15.

16. Avers that its attorneys presently lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16.

WHEREFORE, defendant respectfully requests that the petition be dismissed, with all allowable costs assessed against plaintiff.

Respectfully submitted,

M. CARR FERGUSON
Assistant Attorney General

MARC LEVEY
Attorney

SEPTEMBER 26, 1977

EXHIBIT (D)

THIS DEED, made this 1st day of April, 1950, between Shay-Boyle Land Co., a corporation organized and existing under the laws of the State of West Virginia, party of the first part, the Grantor, and Preston County Coke Company, a corporation organized and existing under the laws of the same State, party of the second part, the Grantee;

WITNESSETH: That for and in consideration of the sum of ten dollars ($10) cash in hand paid and other good and valuable consideration, receipt of all of which is hereby acknowledged, the said Grantor hereby grants and conveys with covenants of General Warranty, unto the said Grantee, all of the hereinafter described tracts of coal, with the mining rights therewith, lying and being in Valley District, Preston County, West Virginia, being part of that certain acreage of coal and other real estate which was conveyed to the Grantor herein by John P. Boyle and wife and Paris R. Shay, Jr. and wife, by deed dated March 29, 1950, and to be recorded in the office of the Clerk of the County Court of Preston County, West Virginia; and further, part of those certain tracts of coal and real estate conveyed to the said John P. Boyle and Paris R. Shay, Jr. by Sunnyhill Coal Company, by deed dated February 4, 1950 and recorded in said county clerk's office in Deed Book 276, page 119; and further, part of those tracts conveyed to said Sunnyhill Coal Company by Sunnyhill Mining Company by two deeds, both of which are dated December 31, 1949 and recorded in said County Clerk's office in Deed Book 276, pages 100 and 104, it being the intention of Grantor to convey all coal it may own under the tracts hereinafter described, and which said tracts of coal and mining rights are designated on that certain Key Number Index now in possession of Grantor as Tracts 115-D, 116-D, 117-D, 118-D, 119-D, 120-D, 122-D, 123-D, 124-D, 125-D, 126-D and 191-D, and further shown on an Easter Colored Map now recorded in Deed Book 229, pages 10 and 11, and which said tracts of coal, and mining rights therewith, are further bounded and de-

scribed by metes and bounds and by deed book and page reference to certain predecessors in title to said Sunnyhill Mining Company, as follows:

FIRST: Beginning at a stone pile in old line, S. 49° E. 22.76 poles to a poplar stump; N. 32¾° E. 102.02 poles; N. 43½° E. 74.6 poles; N. 73° W. 100 poles to a chestnut, in MacPeck's line, with his line, S. 28¼° W. 140.64 poles to stake in center of road; S. 50¼° E. 49.16 poles to the beginning, containing 78.212 acres.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary and convenient rights of way through and under said land, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land, and also to remove thereunder the coal under other lands owned or that may be hereafter acquired by the Grantee, or his assignee, free from all liability on account of any damage that may arise or result from the removal of any or all of said coal, and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon, or any springs or water courses therein or thereon, by reason of the failure of said Grantee, to provide supports for said overlying strata or surface, or by reasons of the mining and removal of all of said coal under said land.

The coal and mining rights above described are the same as were conveyed by John B. Graham and others to Stephen B. Elkins, by deed dated November 6, 1902, and recorded in the office of the Clerk of the County Court of Preston County, West Virginia, in Deed Book 99, page 59.

SECOND: beginning at a beech and gum, corner G.W. Radabaugh and James M. Carroll, now H.D. Carroll, running with crop, S. 36° E. 39 poles; S. 58½° E. 72.9 poles to a stake in Robey's line, and with his line, N. 69½°E. 105.2 poles; S. 26½° E. 13.0 poles; S. 69½° W. 11.9 poles; S. 23° E. 29.5 poles to Reserve, and with same S. 85° E. 14.) poles; S. 23½° E. 13 poles to crop, with same S. 71° E. 48.4 poles to a B.O., corner to David Graham and with his lines, N. 67½° E. 118 poles to a large Gum; N. 84°E. 15.28

poles; N. 88¾° E. 16.48 poles; No. 68¾° E. 5.0 poles, N. 15° E. 5.0 poles; N. 10° E. 3.32 poles; N. 59¾° E. 5.8 poles; N. 27½° E. 3.64 poles; N. 8¼° E. 5.52 poles; N. 28¾° E. 14.0 poles; N. 21° E. 7.0 poles; N. 28° E. 4.0 poles; N. 57° E. 5.36 poles; N. 3¼° W. 11.80 poles; N. 10½° E. 11.2 poles; N. 15¾° E. 10.24 poles; N. 47¼° E. 7.2 poles; N. 38¾° E. 11.52 poles; N. 48¾° W. 44.24 poles; N. 50¾° W. 21.08 poles; S. 68¼° W. 53.0 poles to Reserve and with said line, S. 21¾° E. 8.0 poles; S. 68¼° W. 20.0 poles; N. 21¾° W. 8.0 poles back to D. Graham's line; S. 82¼° W. 2.24 poles; N. 59½° W. 2.56 poles; S. 86¼° W. 3.6 poles; S. 80¾° W. 4.24 poles; South 63¼° W. 4.92 poles; S. 83½° W. 5.08 poles; S. 13¼° W. 5.00 poles; S. 79½° W. 4.32 poles; S. 68¼° W. 1.0 poles; N. 21½° W. 22.72 poles; corner to B.V. McMillen's land, and with his line, N. 42½° W. 22.6 poles to McCauley heirs, and with four lines, S. 56½° W. 145.6 poles; N. 30¼° W. 19.6 poles; N. 88¾° E. 5.08 poles; N. 11° W. 48.52 poles to James M. Carroll, now D.H. Carroll, and with three of his lines, S. 53½° W. 22 poles; N. 30¾° W. 35 poles; S. 50¾° W. 127.7 poles to the beginning, containing 300.408 acres, more or less.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary and convenient rights of way through and under the land of said Grantors, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land, and also to remove thereunder the coal under other lands owned or that may be hereafter acquired by the Grantee, or his assignee, free from all liability on account of any damage that may arise or result from the removal of any or all of said coal, and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon, or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for said overlying strata or surface, or by reason of the mining and removal of all of said coal under said land; but shafts and openings for the purpose aforesaid are not to be located nearer than twenty rods of

the principal buildings existing on said land. Reserving only the right to bore through the coal hereby conveyed for oil and gas, provided such boring is done in such manner as to in no way interfere with the mining and marketing of said coal.

The coal and mining rights above described are the same as were conveyed by Amaziah D. Field and wife to Stephen D. Elkins, by deed dated November 7, 1902, recorded in said County Clerk's office in Deed Book 99, page 49.

THIRD: Beginning at a stake corner to A.D. Fields on coal crop, and with same, S. 89½° W. 100 poles; N. 29° W. 20.56 poles to A.D. Field's line, and with same N. 69½° E. 91.8 poles to school house, S. 37° E. 13 poles to A.D. Field's; S. 23° E. 42 poles to the beginning, containing 21.201 acres, more or less.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary and convenient rights of way through and under said land, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land, and also to remove thereunder the coal under other lands owned or that may be hereafter acquired by the Grantee, or his assignee, free from all liability on account of any damage that may arise or result from the removal of any or all of said coal or from the manufacture of the same into coke or other products and without being liable for any damage that may result to the overlying strata or surface or anything therein or thereon or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for said overlying strata or surface, or by reason of the mining and removal of all of said coal under said land.

The parties of the first part reserve the right to drill and operate through said coal for oil and gas, and other minerals, but such drilling and operation shall be done in such manner as not to injure in any way the property hereby conveyed nor interfere in any way with the rights and privileges herein granted to the party of the second part.

The coal and mining rights above described are the same as were conveyed by Louisa Robey and others to Stephen D. Elkins, by deed dated November 13, 1902, and recorded in Deed Book 99, page 143, in said County Clerk's office.

FOURTH: Beginning at a stone, corner to A.D. Field, and running S. 56½° W. 145.5 poles to a stone and pointers, near the County road; thence N. 30¼° W. 19.6 poles N. 88¾° E. 5.08 poles; thence N. 11° W. 48.5 poles to a stone in James M. Carroll's now H.D. Carroll's line; thence with the same, N. 53½° E. 110 poles to a stone pile; thence S. 42½° E. 68.7 poles to the beginning, containing 51.824 acres.

Also all the Upper Freeport vein of coal known locally as the seven foot vein, upon and underlying that certain tract of land, adjoining the aforesaid tract and bounded and described as follows:

Beginning at a sugar at Northwest corner of David Graham's, now J.H. Graham's land, and also corner to Brown and Graham, and with one of their lines, N. 68¼° W. 69 poles to a stake, corner to Keyser and Frankenberry and with two of their lines, S. 63¾° W. 117 poles; S. 27½° W. 13 poles to a white oak and stone pile, corner to H.D. Carroll; thence with two of his lines S.28½ W. 14.5 poles to a white oak and poplar and birch; S. 42½° E. 125.3 poles to a stone pile; N. 68¼° E. 84.4 poles; N. 9¼° E. 112.7 poles to the beginning, containing 121.645 acres.

Reserving, however, to the said Grantors the right to bore through said vein of coal for oil and gas, and to shaft for and mine any coal underlying the vein hereby conveyed, but such boring for oil and gas and such shafting and mining of said coal, shall be done in such manner as not to interfere in any particular with the Grantee in his deed, his heirs or assigns, in the exercise of the rights and privileges hereby conveyed to him.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary and convenient rights of way through and under said land with necessary drainage, ven-

tilation and ventilating shafts to remove said coal upon and under said land, and also to remove thereunder the coal under other lands owned or that may be hereafter acquired by the Grantee or his assignee, free from all liability on account of any damage that may arise or result from the removal of any or all of said coal or from the manufacture of the same into coke or other products, and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon, or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for said overlying strata or surface, or by reason of the mining and removal of all of said coal under said land.

The coal and mining rights above described are the same as were conveyed by Benjamin V. McMillen and wife to Stephen B. Elkins, by deed dated October 10, 1902, and recorded in said County Clerk's office in Deed Book 99, page 11.

FIFTH: Beginning at a white oak, poplar and birch N. 28½° E. 14.5 poles to a white oak and locust, also corner to Keyser & Frankenberry and B.V. McMillen, N. 27¾° W. 27 poles to a red oak, corner to Reserve, with three lines of same, S. 62¼° W. 13 poles; N. 27¾° W. 13 poles; N. 62¼° E. 13 poles N. 26° W. 92.5 poles; S. 51½° W. 109.3 poles to a stake in County road; S. 56° W. 32.7 poles; S. 3¼° W. 14 poles; S. 51⅓° W. 95.6 poles to a W.O. and beech; S. 16° E. 133.3 poles to a gum and beech, near County road; and corner to A.D. Field, with Field No. 50¾° E. 127.7 poles to a stake near County road; S. 30¾° E. 35 poles N. 53 ½° E. 137.4 poles N. 42½° W. 34 poles to the beginning, containing 233.754 acres, more or less.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary and convenient rights of way through and under said land, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land and also to remove thereunder the coal under other lands owned or that may be hereafter acquired by the Grantee of his assignee, free from all liabil-

ity on account of any damages that may arise or result from the removal of any or all of said coal and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon, or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for said overlying strata or surface, or by reason of the mining and removal of all of said coal under said land.

The coal and mining rights above described are the same as were conveyed by Hardin D. Carroll and wife to Stephen B. Elkins, by deed dated October 22, 1902, and recorded in said County Clerk's office in Deed Book 99, page 29.

SIXTH: Beginning at a beech and gum, corner to Ami D. Field's and James M. Carroll and running with Carroll's lines N. 16° W. 133.3 poles to W.O.; N. 51¼° E. 95.6 poles to a stake; N. 3¼° E. 14.0 poles to a stake; and leaving Carroll's line and running with John A. Radabaugh, N. 20° E. 5.4 poles; N. 1½° E. 4.8 poles; N. 12¾° W. 4.48 poles; N. 9° E. 4.0 poles; N. 34¾° W. 4.76 poles; N. 44¼° W. 3.6 poles; N. 88° W. 25.64 poles; S. 7° E. 5.48 poles; S. 32½° W. 7.0 poles; S. 43¾° W. 6.48 poles; N. 82½° W. 7.6 poles; S. 77½° W. 31.0 poles; N. 78° W. 25.6 poles to a hickory; N. 18° W. 45.36 poles to Parker's line and with same S. 67° W. 2.0 poles to John A. Radabaugh and with his line, S. 22½° W. 27 poles; S. 55½° E. 12 poles; S. 20¾° W. 28 poles; S. 50½° E. 12 poles; S. 17° W. 60.84 poles to a stake, beginning corner to John E. Radabaugh and with his line, S. 70½° E. 24.16 poles; S. 5¼° E. 12.0 poles; S. 8° E. 11.52 poles; S. 18° W. 7.32 poles to "Reserve" and with three of its lines, S. 66¾° E. 11.0 poles; S. 11¼° W. 4.0 poles; N. 84° W. 5.4 poles to crop and with same S. 21° W 16.0 poles; S. 42½° W. 30.0 poles; S. 19½° E. 18.0 poles; S. 24¾° E. 25.24 poles; S. 54¾° E. 19.0 poles; S. 79° E. 19 poles; N. 80½° E. 40.0 poles; N. 61¼° E. 6.4 poles to the beginning, containing 108.441 acres more or less.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary drainage, ventilation and ven-

tilating shafts to remove said coal upon and under said land, and also to remove thereunder the coal under other lands owned or that may be hereafter acquired by the Grantee of his assignee, free from all liability on account of any damage that may arise or result from the removal of any or all of said coal or from the manufacture of the same into coke or other products, and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon, or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for said overlying strata or surface, or by reason of the mining and removal of all of said coal under said land.

The coal and mining rights above described are the same as were conveyed by Damiel T. Gue and others to Stephen B. Elkins, by deed dated November 12, 1902, and recorded in said County Clerk's office in Deed Book 99, page 85.

SEVENTH: Beginning at stake, at end of Geo. W. Radabaugh's line, marked "N. 18° W. 45.36 poles" S. 88° E. 12.4 poles to stone pile; N. 13° W. 33 poles to crop, and with same N. 29½° E. 13 poles; N. 46° E. 15.2 poles to old road and corner to Lyons and with 11 of his lines, S. 77° E. 6 poles; N. 84½° E. 10 poles; S. 62¾° E. 36 poles; S. 79° E. 22 poles; S. 82½° E. 17.7 poles; S. 1¼° W. 9 poles S. 65½° E. 10.4 poles S. 80° E. 21.2 poles; S. ¼° W. 12 poles; S. 11½° E. 17 poles; S. 6° W. 18.4 poles to J.M. Carroll and with one of his lines S. 56° W. 32.6 poles to G.W. Radabaugh and with 14 of his lines N. 20° E. 5.4 poles; N. 1½° E. 4.8 poles; N. 12¾° W. 4.48 poles N. 9° E. 4 poles; N. 34¾° W. 4.76 poles; N. 44¼° W. 3.6 poles; N. 88° W. 25.64 poles; S. 7° E. 5.48 poles; S. 32½° W. 7 poles; S. 43¾° W. 6.4 poles; N. 82½° W. 7.6 poles; S. 77½° W. 31 poles; N. 78° W. 25.6 poles; N. 18° W. 45.3 poles to the beginning, containing 62.953 acres, more or less.

And together with said coal and appurtenant thereto the right and privileges of mining and removing all of said coal together with the necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said

land and also to remove thereunder the coal under other lands owned or that may be hereafter acquired by the Grantee or his assignee, free from all liability on account of any damage that may arise or result from the removal of any or all of said coal or from the manufacture of the same into coke or other products, and without being liable for any damages that may result to the overlying strata or surface, or anything therein or thereon or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for said overlying strata or surface, or by reason of the mining and removal of all of said coal under said lands.

The parties of the first part reserve the right to drill and operate through the said vein of coal for oil and gas and other coal and minerals, but such drilling and operations shall be done in such a manner as not to injure, in any way, the property hereby conveyed nor interfere in any way with the rights and privileges herein granted to the party of the second part.

The coal and mining rights above described are the same as were conveyed by John A. Radabaugh and others to Stephen B. Elkins, by deed dated November 13, 1902, and recorded in said County Clerk's Office in Deed Book 99, page 149.

EIGHTH: Beginning at the end of George W. Radabaugh's line and running S. 17° W. 60.48 poles in John A. Radabaugh's line and with same S. 17° W. 57 poles to crop and with same, S. 77½° E. 8 poles; N. 73¾° E. 9 poles; N. 64½° E. 24 poles; N. 17° E. 5.04 poles, crossing out crop to George W. Radabaugh's reserve corner; N. 18° E. 7.32 poles; N. 8° W. 11.52 poles; N. 5¼° W. 12 poles; N. 70½° W. 24.16 poles to the beginning, containing 9.383 acres, more or less.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary and convenient rights of way through and under said land, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land, and also to remove thereunder the

coal under other lands owned or that may be hereafter aquired by the Grantee or his assignee, free from all liability on account of any damage that may arise or result from the removal of any or all of said coal or from the manufacture of the same into coke or other products, and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon, or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for any overlying strata or surface, or by reason of the mining and removal of all of said coal under said land.

The coal and mining rights above described are the same as were conveyed by John E. Radabaugh and wife to Stephen B. Elkins by deed dated November 12, 1902, recorded in said County Clerk's office in Deed Book 99, page 80.

NINTH: Beginning at a white oak by the County road leading from Herring to Bull Run; thence N. 4½° E. 20 poles; N. 7½° W. 18 poles; N. 2° E. 9.8 poles to a stake near end of a stone fence; thence leaving road, N. 79° W. 21.6 poles to a sugar stump; N. 62° W. 10.7 poles to a stone; N. 4° E. 8 poles to County road; thence with same N. 82° W. 12 poles; N. 76° W. 30 poles; N. 60½° W. 30 poles; N. 84° W. 10 poles; N. 88° W. 18 poles; N. 85° W. 14 poles to a stone pile in an original line; thence with same with the lines of A.K. Jenkins, N. 11½° W. 65 poles to a stake at crop of Freeport coal; thence with same N. 83° E. 20 poles to a stone, corner of coal reserve of one and one-half acres; thence three lines of same N. 70° E. 20 poles; N. 20° E. 12 poles; N. 70° W. 20 poles to a stone by hickory; thence still with coal crop, N. 5° W. 14 poles; N. 15¼° E. 14 poles; N. 37° E. 20 poles; N. 38½° E. 17.2 poles to an original line; thence with same N. 77½° E. 12 poles; thence still with coal crop, N. 72° E. 18 poles; N. 77° E. 28 poles; S. 43½° W. 12 poles; N. 87¼° E. 15 poles; N. 67½° E. 17.1 poles to stake in out line; thence with same S. 26° E. 22.7 poles to a stone pile; S. 64½° W. 49.6 poles to a fallen walnut; S. 58° E. 40.6 poles to a stone pile; N. 75¼° E. 26.8

poles to a white oak stump; S. 24° E. 44.8 poles to a stake; leaving original line and following coal crop, S. 9° W. 34 poles; S. 10¾° E. 49 poles; S. 78½° E. 10 poles; S. 52° E. 14.5 poles to a stake in H.D. Carroll's line; thence with same S. 52° 52′ W. 81.8 poles to the beginning, containing 175.9 acres.

There is further conveyed herein all coal and mining privileges with the right to enter upon and under said land and to mine and remove all of said coal, and to remove upon and under said land the coal from under other lands, together with all necessary and convenient rights of way through and under said land with necessary drainage, ventilation and ventilating shafts to remove said coal upon or under said land, and also to remove the coal under neighboring lands without damage arising from the mining and removal of said coal that may arise to the surface thereof.

The coal and mining rights above described are the same as were conveyed by Samuel P. Lyons and others to Elkins Coal & Coke Company, by deed dated July 20, 1906, and recorded in said County Clerk's office in Deed Book 114, page 22.

TENTH: Beginning at a walnut corner to Lyons and with three of his lines, S.59¼° E. 40.6 poles to stone pile; N. 73¼° E. 26.3 poles to stump; S. 25° E. 38.4 poles to poplar; N. 55½° E. 14 poles to crop and with same, N. 3½° E. 36 poles; N. 46½° E. 42 poles; N. 49¼° E. 56 poles to Pheobe Spurgeon; S. 71¼° W. 5.4 poles; S. 83½° W. 6 poles; S. 38° W. poles; S. 79¾° W. 8 poles; S. 76¾° W. 15.6 poles; N. 80° W. 4.7 poles; N. 62¼° W. 21.6 poles; N. 88¾° W. 15.4 poles; S. 68½° W. 54.7 poles to corner of Lyons and with his lines S. 22° 6′ E. 25.4 poles; S. 68° 8′ W. 49.2 poles to the beginning, containing 42.359 acres.

And together with said coal and appurtenant thereto the right and privilege of mining and removing all of said coal, together with the necessary convenient rights of way through and under said lands, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land, and also to remove thereunder and

thereover the coal under other lands owned or that may be hereafter acquired by the Grantee or his assignee, free from all liability on account of any damage that may arise or result from the removal of any of all of said coal, or from the manufacture of the same into coke or other products, and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon, or any springs or water courses therein or thereon, by reason of the failure of the said Grantee to provide supports for said overlying strata or surface, or by reason of the mining and removal of all of said coal hereby conveyed.

The coal and mining rights above described are the same as were conveyed by John W. Radabaugh and wife to Stephen B. Elkins, by deed dated December 18, 1902, and recorded in said County Clerk's office in Deed Book 99, page 192.

ELEVENTH: Beginning at a stump, corner to J.W. Radabaugh and Lyon and crop, and with same N. 38½° E. 26 poles; N. 7¾° W. 6 poles N. 36½° W. 21 poles N. 18° W. 10 poles N. 9½° E. 20 poles N. 63° E. 41 poles N. 7° E. 20.8 poles to reserve and with three lines of same S. 62¼° E. 16 poles N. 27¾° E. 10 poles N. 62¼° W. 16 poles N. ¼° W. 18 poles; N. 20¾° E. 91 poles S. 40½° E. 8 poles S. 19° E. 28 poles S. 2¼° E. 34 poles S. 11½° E. 57.4 poles S. 21¾° E. 72 poles to stake, corner to J.W. Radabaugh and with nine of his lines, crossing crop, S. 71¼° W. 5.4 poles S. 83½° W. 6 poles S. 38° W. 4 poles S. 79¾° W. 8 poles S. 76¾° W. 15.6 poles N. 80° W. 4.7 poles N. 62¼° W. 21.6 poles N. 88¾° W. 15.4 poles S. 68½° W. 54.7 poles to the beginning, containing 82.205 acres.

And together with said coal and appurtenant thereto the right and privilege of miiing and removing all of said coal, together with the necessary and convenient rights of way through and under all of said land, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land, and also to remove thereunder or thereon the coal under other lands owned or that may be hereafter acquired by the grantee or his assignee, free

from all liability on account of any damage that may arise or result from the removal of any or all of said coal or from the manufacture of the same into coke or other products and without being liable for any damages that may result to the overlying strata or surface or anything therein or thereon or any springs or water courses therein or thereon by reason of the failure of the said grantee to provide supports for said overlying strata or surface or by reason of the mining and removal of all of said coal hereby conveyed.

But there is reserved and excepted from this conveyance by the grantors, sufficient of said coal for farm and domestic use, and the right to bore or drill for oil, gas, or water, but such use of said coal and drilling for oil, gas and water shall be done in such a manner as not to interfere in any way with the mining rights and privileges hereinabove set out.

The coal and mining rights above described are the same as were conveyed by Philip M. Spurgeon and others, by deed dated January 16, 1903, and recorded in said County Clerk's office in Deed Book 99, page 284.

TWELFTH: Beginning at a Double Hickory, corner to A.D. Field; thence N. 49° 16′ W. 730.58 feet to a stake; thence N. 50° 58′ W. 343.27 feet to a Gum; thence S. 67° 35′ W. 1,204.76 feet to a stake near the mouth of a coal bank; thence S. 81° 15′ W. 36.7 feet to the head of coal bank drain; thence down the same with its meanderings, N. 61° 39′ W. 42.56 feet; thence N. 76° 44′ W. 60.41 feet; thence S. 84° 10′ W. 69.1 feet; thence N. 64° 47′ W. 80.79 feet; thence S. 81° 14′ W. 92.93 feet; thence S. 11° 22′ W. 85.45 feet; thence S. 83° 43′ W. 71.05 feet; thence S. 68° 20′ W. 16.23 feet to Bank's line; thence with the same N. 21° 53′ W. 363.89 feet to B.V. McMillen's line; thence with the same N. 67° 20′ E. 1,382.29 feet to a White Oak; thence N. 8° 20′ E. 1,894.57 feet to a Sugar Tree on Cheat Hill; thence S. 88° 05′ E. 2,505.56 feet to a Chestnut; thence S. 26° 48′ W. 2,226.12 feet to a Stake near an old Road; thence with the road S. 24° W. 332.01 feet to a stake; thence S. 26° 56′ W. 255.09 feet to a stake; thence S. 31° 13′ W. 195.02 feet to a stake; thence S. 22° 54′ W.

132.52 feet to a stake and pointers; thence S. 27° 48′ W. 98.05 feet to the old line at the bars; thence with the same N. 49° 15′ W. 87.8 feet to the beginning, containing 132.746 acres.

But there is reserved from the above boundaries a parcel containing one acre of the coal underlying it, bounded and described as follows:

Beginning at a stake near the coal bank where now opened and in use said tract, and the end of the third line of the above described calls; thence N. 18° 52′ W. 168.5 feet to a stake; thence N. 67° 35′ E. 265.32 feet to a stake; thence S. 18° 52′ E. 168.5 feet in said Third line of the above description; thence along said line S. 67° 35′ W. 265.32 feet of the beginning.

There is herein granted and conveyed to the said Grantee and assigns the right of way over and through said land free from any claim for damages to the surface by reason of the mining and removing of said coal thereby conveyed, together with the right to sink shafts and any buildings thereon that it or its assigns may desire in removing and manufacturing said coal thereon, also free from any liability therefor, as well the right to carry through, under said land coal from other lands that the said party of the second part, or its assigns may desire to.

The coal and mining rights above described are the same as were conveyed by David Earl Field and others to Elkins Coal and Coke Company by deed dated April 15, 1910, and recorded in said County Clerk's office in Deed Book 127, page 10.

There is further conveyed by the Grantor to the Grantee herein, all of the Grantor's right, title and interest in and to any surface which the Grantor may own overlying the parcels of coal hereinabove described, but reserving, however, in fee, to the Grantor, all of the roads and rights of way for roads, and all privileges incidental thereto, which Grantor now owns and possesses which may pass on, over or near said coal, and on, over, near and through any surface lands overlying said coal, provided, however that the Grantee is given the privilege of using said roads in con-

nection with the mining and removing said coal herein described and conveyed, for the length of time required for the mining and removing thereof.

Grantor further grants and conveys unto Grantee, for the consideration hereinabove set forth, the right to use an opening into and through the coal situate under Tract 121-D, being a tract of 100.264 acres of coal not herein conveyed, and to have pillars left therein for support so as to cause the Grantee to use said opening as headings for the purpose of gaining access to the coal adjoining said Tract 121-D, and the further right to extend said headings for the purpose of mining and removing the coal hereby conveyed; provided, however, that Grantee's use of said opening and headings is not to begin until Grantor's use thereof has been completed for the coal mining operations which it is now exercising under said Tract 121-D.

Witness the following signature and seal:

SHAY—BOYLE LAND CO.
BY: _____
ITS _____

STATE OF WEST VIRGINIA,
COUNTY OF PRESTON, TO-WIT:

I, CHARLES WEBNER, a notary public in and for said county and state, hereby certify that PARIS B. SHAY, JR., whose name is signed to the writing above bearing date the 1st day of April, 1950, for Shay-Boyle Land Co., a corporation, has this day, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 1 day of April, 1950.

My commission expires June 11, 1956.

_____
Notary Public

STATE OF WEST VIRGINIA, County of Preston, TO WIT:

I, P. F. KING, Clerk of the County Court of said County, do hereby certify that the foregoing writing was this day produced to me in my said office, and together with the certificate and Rev. Stamp thereto annexed, was duly admitted to record therein.

Given under my hand this 21 day of April, 1950—11:29 A.M.

A TRUE COPY

/s/ _____ Clerk

In the Supreme Court of the United States

No. 79-1515

UNITED STATES, PETITIONER,

v.

ELWOOD SWANK, ET AL.

ORDER ALLOWING CERTIORARI, FILED May 12, 1980

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

☆U.S. GOVERNMENT PRINTING OFFICE 1980 321529 4